Clifton

Supreme Court of the United States.

[No. 217.]

THE NEW YORK LIFE INSURANCE COMPANY,

APPELLANT,

vs.

WILLIAM C. STATHAM and PARMELIA A. DUDLEY, formerly Parmelia A. Statham,

APPELLEES.

Appeal from the Circuit Court of the United States for the Southern District of Mississippi.

SUPPLEMENTAL BRIEF FOR ARGUMENT OF

CLINTON RICE,

OF COUNSEL FOR THE APPELLEES.

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SUPPLEMENTAL BRIEF FOR ARGUMENT FOR THE APPELLEES.

The facts presented are as follows:—

On the 8th of December, 1851, at Grenada, Mississippi, Mrs. Lucy B. Statham, wife of Dr. Augustine D. Statham, of that town, through one A. S. Brown, the regular resident agent of the New York Life Insurance Company, there, effected an insurance in that company for $5,000 upon the life of her husband, for which she then and there paid a premium of $208.50, and agreed to pay a like sum annually thereafter on the recurrence of said 8th of December, during the life of the assured; and a policy of such insurance was thereupon issued to her. According to the terms of that policy, the sum insured, less notes due for premiums, was made payable to her, or her legal representatives if she outlived her husband; and in case he survived her, then payment was to be made at his death to, or in behalf of her children.

Mrs. Statham died in 1856, but the premiums on the policy were regularly paid to the agent, Brown, by the legal repre-

sentative of Mrs. Statham, at Grenada, up to the 8th of December, 1861, and the premium due then was tendered said agent, who refused to receive the same, *not*, as he testifies, because he was not acting as agent, but because the company had not furnished him with the proper receipt to be given for the payment of the premium due on that day. (*See Printed Record, p.* 16.)

Dr. Augustine D. Statham, the assured, died the 20th of July, 1862.

The appellees are the children and heirs-at-law of the party in whose behalf the said insurance was effected, and as such, they, on September 3, 1868, originated this cause by filing their bill of complaint in the Chancery Court for the first district of Hinds county, Mississippi, against appellant and against Benjamin G. Humphreys, Livingston Mims, and J. G. Milligan, agents of appellant in Mississippi, who held funds of the company, to recover the amount of the aforesaid policy of insurance less the amount of premium due then, and interest thereon from the 8th December, 1861.

The appellants demurred to the bill upon the grounds, substantially, of non-jurisdiction; and that the complainants had an adequate remedy at law; and that they forfeited all right to the amount of the policy by the non-payment of the premium thereon, which fell due the 8th December, 1861; and that the excuse set up of tender, and the existence of war and non-intercourse, was insufficient to relieve against forfeiture. (*Printed Record, p.* 7.)

The cause was thereafter by consent of the parties transferred to the Chancery Court for the second district of Hinds county, wherein the demurrer was sustained and the bill of complaint dismissed; whereupon appeal was had to the Supreme Court of Mississippi, which reversed the decree, sustaining the demurrer, and of dismissal, in the Chancery Court, and remanded the cause. Afterwards, the cause was removed to the Circuit Court of the United States for the southern district of Mississippi, (*in equity,*) and on the 29th November, 1873, judgment was given therein for these appellees against the company for $5,000 principal-sum due on the policy, less

$208.50 premium due and tendered the 8th December, 1861, with $2,273.56 interest, (the same calculated at the rate of six per cent. per annum for seven years ten months and twenty-seven days,) and the aggregate sum to bear interest at the rate of six per cent. per annum from the 28th November, 1873, till paid, and the taxable costs.

From this decision the company appeals to this tribunal.

In connection with the case it was agreed in writing (*see original on file with the record*) between counsel for the respective parties, as follows, to wit:

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF MISSISSIPPI.

IN EQUITY.

WILLIAM C. STATHAM *et al.*
vs.
THE NEW YORK LIFE INSURANCE COMPANY *et al.* } No. 179.

The complainant having exhibited interrogatories for the purpose of cross-examining MORRIS FRANKLIN, President of said company, as follows:

1. When you say in your deposition that A. S. Brown was not, on the 8th day of December, 1861, in possession of any receipt for the premium on Dr. Statham's life policy, then due, signed by either the President or actuary of the company, you mean, I suppose, that, *so far as your knowledge extended, he was not?*

2. When you state in your deposition that said Brown ceased to be an agent of said company on the 16th day of August, 1861, and thereafter had no authority given him to act in any respect for the company, *do you state that as a matter of opinion, and not as a matter of fact?*

3. *Did said company ever make a formal revocation of Mr. Brown's agency?*

To save delay and expense of taking said deposition, it was agreed between counsel for complainants and defendants that the answers to said questions would be identical with the answers to similar questions propounded to the witness in the case of *Charlotte Seyms* v. *The New York Life Insurance Company*, now pending in the Supreme Court of the United States under No. 463, [218,] and *that the court at the hearing should so consider.*

It was also, in open court, at hearing before the Circuit Court of the United States for said southern district of Mississippi, agreed that such answers would have been given to said questions, and *that the court should so consider.*

This agreement is now reduced to writing and signed by the parties, so that the matter aforesaid may be considered by said court as if said agreement had been signed and incorporated in the record.

W. L. NUGENT,
Solicitor for Complainant.
T. J. & F. A. R. WHARTON,
Atty's for N. Y. Life Ins. Co.

CLINTON RICE,
Of Counsel for Appellees,
J. A. GARFIELD,
Of Counsel for N. Y. Life Ins. Co.
WASHINGTON, D. C., *March* 23, 1876.

ANSWERS TO THE ABOVE.

The answers to the above agreed upon cross-interrogatories by said deponent, Morris Franklin, are respectively (*see p.* 8, *Printed Record*, on file, in the case of "*The N. Y. Life Ins. Co.*, plaintiff in error, v. *Charlotte Seyms*, No. 218, being the same case referred to in the foregoing stipulation) as follows, to wit:

To the 1st cross-interrogatory the answer of the witness is—"*Yes; not beyond that.*"

To the 2d cross-interrogatory the answer of the witness is—"*Yes, sir; as a matter of opinion.*"

To the 3d cross-interrogatory the answer of the witness is—"*Not to my knowledge.*"

AS TO THE RECORD.

The record presents all the material facts in the case.

The testimony given by the principal witness for appellant, Morris Franklin, president of the insurance company, that A. S. Brown was no longer agent of the company on December 8, 1861, (*Printed Record, p.* 35,) is wholly interested, opinionated, and presumptive, and, therefore, as upon the point named, is of no weight and entitled to no consideration.

The declaration of appellant, (*Printed Record*, *p.* 25,) that Dr. Statham could have changed his residence to a non-insurrectionary State, is not supported by the evidence presented, and presumes a line of obligations on the part of the assured not contemplated by any construction of the contract of insurance and quite impossible for him to have performed.

The declaration of appellant (*Ib.*) that, had the insured so desired, he could have paid the premium due the 8th of December, 1861, presumes a disinclination on the part of the assured to perform his part of the contract of insurance that is nowhere sustained, or to be even remotely inferred from anything developed in the case.

The declaration of the bill of complaint (*Printed Record*, *p.* 2) that the interests, feelings, and sentiments of Dr. Statham were with the people of his State in the war of the rebellion, *because his kindred were in the military service of the Confederate States*, is expressed as a mere matter of opinion; and, being unaccompanied by any admission or direct proof of any overt act of treason or of practical enmity towards the United States, should have no weight in considering the questions involved in this case.

Points for Consideration.

The assignment of errors embraces the various points raised on demurrer and in the answer and cross-bill of appellant herein, and involves the consideration of these questions:

I. As to the jurisdiction of the Court of Chancery.

II. Was the policy of insurance forfeited by any act of the assured; or, by any act of the company preventing the performance by the assured of his part of the contract upon which the policy was issued?

III. How was the contract of insurance affected by the war?

IV. Was A. S. Brown, to whom was tendered the premium due on the 8th December, 1861, the agent of the company on that day?

V. What were the local obligations, duties, and responsibilities of the appellant in Mississippi during the late war?

I.

As to the jurisdiction, &c.

The question of jurisdiction raised on demurrer is settled by the provisions of the laws of Mississippi. (*See Rev. Code, Miss.*, 1857, *p.* 549, *art.* 602.) And in Freeman *v.* Gwin *et al.*, 11 Smedes & Marshall, 58; McKay *v.* Cobb & Manlove, 33 Miss., 533; and Scruggs *et al. v.* Blain *et al.*, 44 Miss., 406, it is held that the basis of the jurisdiction is purely statutory, depending on the condition of facts stated, to wit: absence of the debtor, the presence of assets, or his ownership of realty within the State.

In this case the New York Life Insurance Company, the debtor, is a corporation of New York, non-resident of Mississippi, (the State of the creditor's domicile,) and had funds and effects in the hands of parties therein, which would be transmitted to New York, unless restrained by injunction.

Of the same effect are the cases reported in 3 Manf., (Va.,) 94; 7 Cranch., (Ib.,) 202; 3 Leigh, (Ib.,) 300; The Same, 507; The Same, 406; 2 Rob., (Va.,) 206.

The jurisdiction of a court of equity is applicable in every case where remedy at law is not plain and unembarrassed. In this case the remedy sought is not plain and unembarrassed. Payment of the premium due December 8th, 1861, had not, in fact, been met, though tender was made to the person who acted as agent anterior to the war. Such offer would undoubtedly relieve in equity. One of the original inherent powers of a Court of Chancery is to relieve against forfeitures where the party is not in fault, and which are accidental; and in this matter, wherein we are in no wise in default, and to whom the war was purely an accident, beyond our control, it seems a clear case for a court of equity. [2 *Story's Eq.*, *sec.* 775. See also Parker *v.* Winnepisseogee Co., (2 Bl., 551;) Boyce Exrs. *v.* Grundy, (3 Pet., 215;) In Wing *v.* Harvey, (5 De G. M. & G.,) Eng. Chancery in a similar case the jurisdiction was not questioned, and the relief asked granted.]

The term "*accident*," in the construction of a court of equity, is not merely inevitable casualty, or the act of God, or of

irresistible force, but such events, misfortunes, losses, acts, or omissions, as are unforeseen, or are not the product of neglect or misconduct in the party. [*Story Eq.*, (sec. 78;) *Ib.*, (secs. 79, 80.)]

It was claimed that the bill should have been dismissed because the complainant has an adequate remedy at law. Such being the case, equity (*Story Eq.*, *sec.* 1301) has concurrent jurisdiction to afford relief in case of forfeitures, and when the claim is not purely a legal demand. ——— Ins. Co. *v.* Bailey, (13 *Wall.*, 616,) holds in our support.

Particular reference is also made to the full presentation of the question in the brief and argument of appellee's counsel in the cause No. 228, Mu. L. Ins. Co. of N. Y., aplt., *v.* Hamilton, Ex'r, appeal to this court from C. C. S. Dist. N. Y., Point III, p. 29.

The condition which was to defeat the right of Mrs. Statham to demand performance of the contract was a condition subsequent to the promise and undertaking on the part of appellant to pay; but whether precedent or subsequent, as the performance of the condition was rendered impossible by the act of the law, as it would have been illegal for Mrs. Statham to pay, as well as on the part of the company to receive payment during the war—this case is one in which a court of equity has uniformly granted relief.

Quoting from the brief of the learned counsel for the appellee in the *Mu. Life Ins. Co. of N. Y., Aplt. v. Hamilton, Ex. No.* 228, before this court, a case embracing precisely the questions involved in this case, we assert that it is probable—

"That no case can be found where equity has refused relief from a forfeiture under circumstances of like character to those now involved; and if more numerous cases, where the precise relief now sought has been actually afforded, are not to be cited, it is either because the business of life insurance is of such recent origin that opportunity for adjudicating the effect of war upon life policies has rarely been afforded, or because a more liberal and enlightened view of their obligations has in general influenced the action of life companies in like cases."

II.

Was the policy of insurance forfeited by any act of the assured?

It is not shown, nor can it be truthfully asserted by the appellants, nor is there any pretense that any of the statements upon which the policy was granted were found to be untrue—or that the assured neglected at any time to pay the premiums promptly when due—or that he went outside of the prescribed limits laid down in the policy—or that he entered into any military or naval service—or that he gave voluntary aid and comfort to enemies of the United States—or that he died in consequence of a duel, or by the hands of justice, or in the violation of any law of the United States, or of any State, or country—or that his death was caused by his own hand, or by intoxicating drink, or opium, &c.

On the contrary, it is both proven and admitted by the pleadings that the annual premiums were always paid whenever they fell due, and sometimes were tendered before they were due, (*Dep. of A. S. Brown, p.* 16, *Rec.*,) and that the premium to be paid on the 8th December, 1861, was duly tendered to the agent of the company, as usual, at Grenada. The agent refused to accept the tendered premium, and thus it was not paid, but that was not the fault of the assured. The assured did all that he was bound to do by the terms of the contract. (See *Printed Record, pp.* 5. 6.)

Nothing that was possible to be done to protect the policy was omitted by the assured, and, as is evidenced by the pains taken to tender the premium due on the 8th December, 1861, several days prior to that date, (*test. of A. S. Brown, Printed Rec., pp.* 15–16,) he was most anxious and determined to be prompt and effective, and to anticipate the payment lest some accident should prevent its timely liquidation, and in attempting this payment to Brown, the usual agent, he did as he had been at first instructed by the company to do, and as he had not otherwise done year after year for the ten years preceding, and as he expected to do during the term of his life. He knew nowhere else to make payment, and the company had

not given him notice, nor had it made any attempt to notify him to pay his annual premiums elsewhere.

Was the policy of insurance forfeitable by any act of the company, preventing the performance by the assured of his part of the contract, upon which the policy was issued?

The company by its own act could not work a violation of the contract or forfeiture of the policy on the part of the assured.

No one can take advantage of the non-performance of a condition who has himself obstructed or in any way interrupted its performance.

Where performance is prevented by act of the party entitled to its benefit, the opposite party is excused from proving strict compliance with the condition.

Williams *v.* Bank U. S., 2 Pet., 102; *see also Bliss on Life Ins.,* 2d ed., p. 59, *note* 3 *and cases cited.*

One party alone cannot change a stipulation in the contract, either express or implied, which is to enure to the benefit of another. [Semmes *v.* City Fire Ins. Co., (6 *Blatch.*, 449.)]

If, owing to the prohibitory regulations of the belligerents it was unlawful for the assured to pay the premium and the company to receive it, then it is submitted that the contract in question, like all other contracts, is subject not only to existing laws but also to the dormant power of the Government called into exercise by constitutional limitations.

Where land is sold with full warranty of title and against eviction, the warranty is not broken if it be taken by the Government in the exercise of a sovereign power.

Bourg *v.* Niles, (*La. An.*, 1851.)

Contracts absolute on their face would not be enforced according to the strict letter of their terms, where loss is occasioned by an event not contemplated by the parties, or by an authority not lawful to resist.

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impossible at the time of their creation, or afterward become so by the act of Providence, or of the law, or of the party to be benefited, or if they are contrary to the law, or if repugnant to the nature of the estate or grant. [See Walker *v.* Osgood, (53 *Me.*, 432;) Glover *v.* Taylor, (41 *Ala.*, 124;) Story's Eq., (*secs.* 1304, 1307;) Coke's Com., (*Co. Litt.*, 206*a*;) 2 Pars. Cont., (*pp.* 672, 673, 674.)]

III.

How was the contract of insurance on the life of Dr. A. D. Statham affected by the war of the rebellion?

In other words, did the late war, growing out of the secession of the southern States from the Union abrogate completely the contract of insurance made between the appellant and Lucy B. Statham, December 8, 1851—ten years before the war—the terms of which were faithfully observed by the assured in every particular, and which, as we have shown, the appellant could not forfeit, or did the war simply suspend the operation of the contract during the period of hostilities?

If the war of the rebellion annulled the policy, then it became void August 16, 1861, (the date of the beginning or existence of the war, according to President Lincoln's proclamation,) though the premium covering the time to the succeeding December 8th had been paid and accepted December 8, 1860.

It has been determined by this court, in many cases, that the war of the rebellion, as between the parties engaged, involved the same consequences and disabilities as are incident to a war with a foreign power, and accordingly a suspension of all intercourse, such as commerce, trading, &c., &c., except license granted by competent authority, is issued. The object of this is to prevent the rendering of aid and comfort to the enemy. When the period of hostilities has passed the former state of things is permitted to prevail. [See United States *v.* Grossmeyer, (9 *Wall.*, 72;) Montgomery *v.* United States, (15 *Wall.*, 395;) Lapine *v.* United States, (17 *Wall.*, 601.)]

Now, wherein does a policy of life insurance, issued *ante bellum*, give aid and strength to the party to whom issued, or to his country in the carrying on of a war? All that is required or that can be done is to keep up the premiums as they mature. If this could be effected without sending the money to the insurer it could not increase the strength and ability of the assured in his country to do hostile acts, nor would it diminish or adversely affect the resources of the country of the assurer. We will grant that the policy within the enemies' territory was a valuable security, which might, under some circumstances, be put up for the purpose of effecting a loan necessarily of no great amount; but the loan must be confined to the country of the enemy and the money obtained from an enemy lender. How, then, are the resources of the enemy increased or made more effectual as an opposing force by the transaction? The argument is labored, remotely brought, and weightless; and yet it is presented as a principal reason why a great injustice should be excused, and why a wealthy corporation, which has not, and cannot in any event, sustain loss, (for the premiums already paid and interest thereon will fairly reach the amount involved,) shall be freed from its bounden obligations to an unoffending party. Of no weight is the decision in Tait *v.* New York Life Insurance Company, (C. Ct. U. S., W. Dist. Tenn., 4 *Bigelow L. and A. Ins. R.*, 479,) in the light of the large preponderance of opposite views held by the various State and United States courts. Equally untenable are the adverse positions assumed in Dillard *v.* Manhat. Life Insurance Company, (44 Ga., 119.)

Says *Simrall, J., Sup. Ct. Miss.*, in his very clear opinion in this case, (45 Miss., 592:)

"Analyze this policy, and its legal elements are these: the assured engages, upon payment of so much down and an annual sum so long as Dr. Statham lives, within sixty days after his death, on notice and proof of the fact, to pay to the owner of the policy $5,000. Punctually the payment of the annual sums must be made on the pain of losing the right to demand the $5,000.

"When the war broke out the assurer had done nothing; indeed no act of performance would devolve upon him until

after the death of the assured. When that occurred the war was in existence, and he could not lawfully remit from New York the $5,000, and his duty to do so was postponed until the impediment was removed and intercourse and business might lawfully be resumed."

In what essential feature does this contract differ from an advance of money, made by a citizen of New York in 1851, on the bond of a citizen of this State, (Mississippi,) payable sixty days after the death of Dr. Statham, on the consideration of the payment of $200? It would not be asserted that the war, *propria vigore*, annulled the contract. It was legal when made. There was no legal impediment in the way when entered into. *The war could have no other effect than to suspend remedy upon it, or performance of it, because of the interdict of all commerce and intercourse between the parties. Cases in point are—*

Semmes *v.* Hartford Ins. Co., (14 *Wall.*, 158.)
Hamilton *v.* N. Y. Mutual Life Ins. Co., (9 *Blatch.*, 234.)
N. Y. Life Ins. Co. *v.* Clopton, (7 *Bush*, Ky., 179.)
Manhattan Life Ins. Co. *v.* Warwick, (20 *Grat.*, Va., 614.)
Cohen *v.* N. Y. Mutual Life Ins. Co., (50 *N. Y.*, 610.)
Sands *v.* N. Y. Life Ins. Co., (50 *N. Y.*, 626.)

See also the decision of the Chancellor in the case of Griswold *v.* Waddington, (16 *Johns.*, N. Y., 438,) wherein will be found a long and careful discussion of the effect of war upon the relations of the inhabitants of respective belligerent countries.

Tested by principles of abstract justice and right, the forfeiture is a nullity. Payment was forbidden by the law of nations, the act of Congress, and the President's proclamation. The law cannot recognize a default where the law forbids performance.

Semmes *v.* Hartford Ins. Co., (13 *Wall.*, 158.)
Dean *v.* Nelson, (10 *Ib.*, 169.)
Brewster *v.* Kitchen, (120 *Raym.*, 317.)
Tenlevey *v.* Hubbard, (3 *B. & P.*, 291.)

The court is respectfully referred to the very elaborate and conclusive treatment of the effect of war upon contracts of life insurance contained in *Bliss on Life Insurance, 2d edition, page 657 to page 702, and to the cases therein cited,* wherein the great preponderance of the decisions upon the subject in the various courts of last resort in New York, Virginia, Kentucky, Mississippi, Georgia, Missouri, the lower courts of Maryland and New Jersey, and by the circuit courts of the United States for the southern district of New York, the southern district of Mississippi, the western district of Tennessee, and the eastern district of Virginia, is conclusive in favor of the propositions:—

That the contract of life insurance is not an executory contract of such a nature that it is *ipso facto* terminated or abrogated by a state of war.

That the condition rendering the policy void in the event of the non-payment of the premiums on fixed days had no reference to a state of war, and so long as such war continues the payment of premiums is excused.

That if the insured has died during the war the assured may, on complying with the terms of the policy as to notice and proof after the close of the war, demand and compel payment of the amount insured less the unpaid premiums at the time of death.

That the contract of life insurance when made for the life time of the insured is not a contract from year to year, making the payment of premiums a *condition precedent*, but is a contract for life, to which the payment of the premiums is a *condition subsequent*.

Says the New York Court of Appeals in affirming the decision at General Term Supreme Court New York, in Sands *v.* N. Y. Life Insurance Co., (50 N. Y., 610.) The contract, I do not think, was nullified by the war. It was a valid policy to become void by omission to pay an agreed annuity. In principle, it is like a lease or grant of lands in fee, reserving rent, to become void, if rent is not paid, if the condition subsequent be not complied with. The agreement is to insure for the life of the assured. *Subsequent* failure to pay the annuity

when due defeats the policy. *It is a condition subsequent, not a condition precedent.*

The war would suspend such a contract until peace came. There is no such principle upon which war would annul it. Such a contract affords no aid or comfort to the enemy. It is idle to say that it fosters or implies commercial intercourse. (See sec. 388, p. 664, 2d ed.; *Bliss on L. Ins.*, and cases referred to.)

IV.

Was A. S. Brown, to whom was tendered the premium due the 8th December, 1861, the agent of the insurance company on that day?

No act of Brown, as appears, terminated his agency. It is not shown that he took any part in the rebellion, or that he gave voluntary aid and comfort to the enemy, or that he resigned, deserted, or neglected his agency, or that his agency expired by limitation; and his agency had evidently not been revoked by the insurance company, (*see answer of Morris Franklin to the 3d cross-interrogatory of appellees, p. 4 hereof,*) and the payment tendered to him of the premium on the Statham policy on the 8th December, 1861, was equivalent to payment to the company, and his refusal to receive the premium, whether he had the company's receipt for the same or not, saves the forfeiture of the policy.

It is no excuse for the company that it was unable lawfully to forward receipts or receive premiums, or otherwise to communicate with its agent, by reason of the suspension of intercourse between New York and Mississippi, or that the insurer is a mutual company, and that the relation between it and the assured is that of partnership, and therefore dissoluble by the war. As supporting these views, see—

Sands *v.* N. Y. L. Ins. Co., (50 *N. Y.*, 626.)
N. Y. L. Ins. Co. *v.* Clopton, (7 *Bush., Ky.*, 179.)
Manhat. L. Ins. Co. *v.* Warwick. (20 *Grat., Va.*, 614.)
Hamilton *v.* Mut. L. Ins. Co., (9 *Blatch.*, 234.)
Smith *v.* Charter Oak L. Ins. Co., (*Cent. Law Jour., St. Louis, vol.* 1, *p.* 76.)

Hilyard *v.* Mut. Ben. L. Ins. Co., (35 *N. J.*, 415.)
Bliss on L. Ins., 2d ed., pp. 660, 661, and cases there cited.

The war did not revoke Brown's agency.

It is conceded in the *U. S. v.* Grossmeyer (9 *Wall.*, 72) by this court that "a resident in the territory of one of the belligerents may have in time of war an agent residing in the territory of the other to whom his debtor could pay his debt, but such agency must have been created before the war began." In the present case Brown was agent of the appellant eleven years anterior to the war of the rebellion, and, if I am correctly informed, is this day acting in the same capacity.

The powers of insurance agents in the insurrectionary States, so far as they related to the payment of premiums on policies issued through them respectively before the war, were not revoked by the war, and payment or tender to them was equivalent to payment to the company, when but for the war such would have been the case. Though an agent under such circumstances could not lawfully make new contracts, nor remit premiums to his principal through the contending lines, yet he could properly receive premiums on policies issued and in force *ante bellum*, and such premiums the insured could lawfully pay. Supporting these propositions are the cases of Sands *v.* N. Y. L. Ins. Co., (50 *N. Y.*, 626;) N. Y. L. Ins. Co. *v.* Clopton, (7 *Bush., Ky.*, 179;) Manhat. L. Ins. Co. *v.* Warwick, (20 *Grat., Va.*, 614;) Hamilton *v.* Mu. L. Ins. Co., (9 *Blatch.*, 234;) Smith *v.* Char. Oak L. Ins. Co., (1 *Cent. Law Jour., St. Louis, p.* 76.)

V.

What were the local obligations, duties, and responsibilities of the appellant in Mississippi during the late war?

By the laws of Mississippi relating to foreign insurance companies doing business therein, (*see Code of Mississippi*, 1857, *under which the Statham contract existed, hereto annexed, marked "A,"*) the corporation acquires a *quasi* domi-

cile there, and through its resident agents must transact its business therein. The plain intent of the statute is to localize the contract, and the company was bound to keep an agent there to whom payment might be made, even during war, and its failure to do so would excuse the non-payment of annual premiums, and foreign companies doing business with Mississippians under that law (and they could deal with citizens under no other) must be considered as engaging to accept performance from the assured there, and on their part to pay losses there. Sustaining these views are: Manhat. L. Ins. Co. *v.* Warwick, (20 *Grat.*, 614;) by a majority of the court: Hamilton *v.* Mu. L. Ins. Co., (9 *Blatch.*, 234;) N. Y. Life Ins. Co. *v.* Clopton, (7 *Bush.*, Ky., 179.)

Has appellant shown that it had an agent in Mississippi to receive the premium of the assured, according to the statute of Mississippi?

Policies of insurance are not inter-State transactions, though the parties may have residence in different States. The policies are not executed contracts until delivered by the agent in the State of the citizen to whom issued. They are then local transactions and governed by the local law.

Bank of Augusta *v.* Earle, (13 *Peters*, 586.)
Paul *v.* Virginia, (8 *Wall.*, 168.)
Faut *v.* Miller, (17 *Grat.*, *Va.*, 47.)
Daniels *v.* Hud. Riv. Co., (12 *Cush.*, 417.)

The appellant was bound by the laws of Mississippi, when the policy issued to keep an agent, at all times during the life of the policy, and wrongfully revoked the appointment of such agent in 1861, after the outbreak of the rebellion. [Semmes *v.* City Fire Ins. Co., (6 *Blatch.*, *C. C.*, 445,) reversed on appeal, but the question stated was not passed upon by this court, (13 *Wall.*, 159;) also, S. C., (1 *Ins. Law Journal*, 573.)]

The statute of Ohio (*L. of* 1872, *p.* 66) expressly provides that, "In case any such insurance corporation shall cease to transact business in this State according to the laws thereof, the agents last designated or acting as such for such corporation shall be deemed to continue agents for such corporation, for the

purpose of serving process for commencing actions upon any policy or liability issued or contracted while such corporation transacted business in this State; and service of such process for the causes aforesaid upon any such agent shall be deemed a valid personal service upon such corporation."

"Companies complying with the statute referred to and doing business in this State (Ohio) under licenses (required by statute) become in suits brought against them there personally amenable to the jurisdiction of the courts of this State, and are to be treated for purposes of suits as corporations of this State." (N. Y. Life Ins. Co. *v.* Best *et al.*, Sup. Court Ohio, Dec., '72; 23d Ohio State Rep., 105.) (Sec. 18, act of Ohio Leg., April 27, 1872.)

VI.

1. While assenting to the general proposition that upon this tribunal devolves the responsibility of finally and conclusively settling the important questions involved in this case the counsel for the appellees dissents from the implication conveyed by the first point presented in the brief of appellant's counsel, (*p.* 9,) that the decisions of State courts upon these questions ought to have no weight or character in the Federal Courts. In this case the Supreme Court of Mississippi and the Circuit Court of the United States concurred in favor of the appellees here. Similar coincidences are noted in other cases.

2. If appellant's counsel ignore the war and its effect upon the contract herein, as must be inferred from his 2d point, (*p.* 10 *of appellant's brief*,) then all discussion is at an end, for it is because of the war that this case is in court; and but for it the company would have no grounds or excuse for declaring and attempting to maintain that the Statham policy was forfeit, there being no pretense that it was otherwise thus affected.

3. It is claimed that the promise to pay a premium of insurance is not a debt, because it is optional with the insured to pay or not. It seems as if an agreement to pay a certain sum

at any future period for a consideration expressed constitutes a debt in the fullest meaning of the term.

It appears from the foregoing labored and far-fetched propositions as if the appellants, failing upon all other points to establish their case, had taxed to the utmost their inventive faculties to present something new and strange, and to assume novel positions which have not been incorporated among the elements of the case, and which, therefore, should not have consideration here.

VII.

As bearing with decided favor upon this case, we would respectfully invite the attention of the court to the elaborate and careful brief of counsel for the appellee in *The Mutual Life Insurance Company of New York* v. *Hamilton's Executors*, (No. 228,) in this court, before cited, and to the case of Worthington *v.* Charter Oak Insurance Company, (41 Conn.,) also to Judge Simrall's opinion, reported in 45 *Miss.*, 592, also to the treatise upon the "*effects of the war upon contracts of life insurance*" in Bliss on Life Insurance, 658.

Upon these and upon the preponderance of judicial opinion expressed in the cases cited, and upon well known governing principles of equity and justice, it may safely be assumed that—

1. A court of equity has full jurisdiction of the case, and that it was properly herein invoked;

2. That the contract was not willfully violated in any respect by the assured;

3. That for the purposes of contracts of insurance made before the war, the agent, Brown, was a properly accredited agent during the war, and tender to him, in view of the utter impossibility of making direct tender otherwise to the company, was tender to the company;

4. That the company's contracts in Mississippi were localized contracts, according to the laws of that State, the action of which laws were not suspended by the war, and that the agent of the company there represented the company, and the

contracts of the company made there could well be carried out without violating in any respect the non-intercourse acts of either belligerent, and that the condition of war did not therefore revoke his agency, and that the continuance of such agency violated no rule of law, and was not repugnant to patriotism;

5. That the contract of life insurance, when entered into by the parties before the war, is not of such a nature that its continuance would give aid and comfort to the enemy, and that therefore it is not forfeited by the war;

6. That contract of life insurance, when granted for the time of life of the insured, is in the nature of an executed contract, depending upon conditions subsequent, and as such a state of war or belligerency does not work its forfeiture or abrogation.

VIII.

The decree appealed from, should be affirmed.

CLINTON RICE,
Of Counsel for the Appellees.

A.

Referred to in the annexed brief and argument.

The Code of 1857 of Mississippi.

Section XI.

Agencies of Foreign Insurance Companies.

Art. 57. It shall not be lawful for any agent of any insurance company, incorporated by any other State than the State of Mississippi, directly or indirectly, to take risks, or transact any business of insurance in this State, without first procuring a certificate of authority from the auditor of public accounts; and before obtaining such certificate, such agent shall furnish to the said auditor a statement, under the oath of the president, or secretary of the company for which he may act, which statement shall show:

First. The name and locality of the company.

Second. The amount of its capital stock.

Third. The amount of its capital stock paid up.

Fourth. The assets of the company, including,

1st. The amount of cash on hand, and in the hands of agents or other persons.

2d. The real estate unincumbered.

3d. Bonds owned by the company, and how they are secured, with the rate of interest thereon.

4th. Debts to the company secured by mortgage.

5th. Debts otherwise secured.

6th. Debts for premiums.

7th. All other securities.

Fifth. The amount of liability, due or not due, to banks or other creditors, by the company.

Sixth. Losses adjusted and due.

Seventh. Losses adjusted and not due.

Eighth. Losses unadjusted.

Ninth. Losses in suspense, waiting for further proof.

Tenth. All other claims against the company.

Eleventh. The greatest amount insured in any one risk.

Twelfth. The greatest amount allowed by the rules of the company to be insured in any one city, town, or village.

Thirteenth. The greatest amount allowed to be insured in any one block.

Fourteenth. The act of incorporation of each company.

Which statement shall be filed in the office of said auditor, together with a written instrument, under the seal of the company, signed by the president and secretary, authorizing such agent to acknowledge service of process, for and in behalf of such company, consenting that service of process upon such agent shall be taken and held to be as valid as if served upon the company, according to the laws of this State; and waiving all claim of error by reason of such service; and no insurance company, or agent of any insurance company, incorporated by any other State, shall transact any business of insurance in this State, unless such company is possessed of at least one hundred and fifty thousand dollars of actual capital invested in stocks of at least par value, or in bonds or mortgages of real estate worth double the amount for which the same is mortgaged; and upon filing the aforesaid statement and instrument with the auditor, and furnishing him with satisfactory evidence of such investment as aforesaid, it shall be the duty of said auditor to issue a certificate thereof, with authority to transact business of insurance, to the agent applying for the same.

ART. 58. It shall be unlawful for any agent of any com-

pany incorporated by any foreign government other than a State of this Union, to transact any business of insurance in this State without procuring a certificate of authority from the auditor, such agent having first filed under oath, in the office of said auditor, a statement setting forth the charter or act of incorporation of the company for which he or they may act, and the matters required to be specified by the last preceding article, and the authority therein mentioned, and furnished evidence, to the satisfaction of the auditor, that such company has invested in the stocks of some one or more of the States of this Union, or of the United States, the amount of one hundred and fifty thousand dollars, and that such stocks are held by citizens of the United States; and the said agent of such company, filing said statement and furnishing evidence of investment as aforesaid, shall be entitled to a certificate of authority, in like manner as is provided for in the last preceding article.

ART. 59. It shall be the duty of the agent, in either of the foregoing articles mentioned, before taking any risks or transacting any business of insurance in this State, to file in the office of the probate court of the county in which he may desire to establish an agency for such insurance company, a copy of the statement required to be filed with the auditor as aforesaid, together with the certificate of said auditor, which shall be carefully preserved for public inspection by said clerk, and also to cause said statement and certificate to be published in some newspaper, of general circulation in said county, for three successive weeks.

ART. 60. The statement and evidence of investment required by this act, shall be renewed annually, on the first day of March in each year. The first statement shall be made on the first day of April next, and the auditor on being satisfied that the capital, securities, and investments remain secure as at first, shall furnish a renewal of the certificate as aforesaid, and the agent obtaining such certificate shall file the same, together with the statement on which it was obtained or renewed in the office of the clerk of the probate court of the county in which such agency is established, and shall cause the same to be published in at least one newspaper of said county for three weeks.

ART. 61. Whenever any loss shall occur of any property insured by any company authorized to take risks under this act, it shall be the duty of the agent by whom the insurance was made, to retain in his possession all moneys belonging to said company which may then be in or may thereafter come

into his possession till such loss is adjusted and paid. *Provided*, That if suit shall be commenced by the party insured against such company, the agent may deposit in court the amount mentioned in the policy, to abide the event of the suit, or if the party insured shall not commence suit within ninety days after the agent shall have given written notice to such party that the loss will not be paid, the agent may thereafter pay over to the persons entitled the moneys of said company.

ART. 62. Copies of all papers required by this section to be deposited in the office of the auditor, certified under the hand and seal of such auditor to be true and correct copies of such papers, shall be received as evidence in all courts and places, in the same manner and have the same force and effect as the originals would have if produced.

ART. 63. Any person violating the provisions of this section, shall, upon conviction thereof, in any court of competent jurisdiction, be fined in any sum not exceeding one thousand dollars, or imprisoned in the county jail not more than thirty days.

ART. 64. The auditor, for receiving such statement and issuing the license, shall receive the sum of two dollars and fifty cents for each license so granted; and the clerk of the probate court of each county where the agency may be located, for filing each statement, shall be entitled to one dollar and fifty cents.

SUPREME COURT OF ERRORS.

MARIA WORTHINGTON

vs.

CHARTER OAK LIFE INSURANCE COMPANY.

OPINION OF THE COURT.

CARPENTER, J.

This is an action on a policy of life insurance. The declaration sets out the policy, alleges the payment of the annual premium up to January 14th, 1862, the non-payment and an excuse for non-payment for that and the succeeding years, the death of the insured, proofs of death, and a refusal to pay. To the declaration there is a demurrer. The sufficiency of the declaration depends upon the legal effect of the non-payment of the premiums, considered with reference to the facts alleged as an excuse.

A contract of life insurance is a peculiar contract. It has no parallel and few analogies in all the business transactions of life. An ordinary life policy, like the one in suit, requiring the payment of annual premiums, consists of two parts, and is divisible. The applicant, upon the payment of the first premium, effects an insurance upon his life for one year, and *purchases a right* to continue that insurance from year to year, during life, at the same rate. Whether he will continue it or not is optional with

him. The premium for the first year pays for the risk during that year, and for the right to subsequent insurance. The rate of insurance for a single year is less than the annual premiums on a life policy. The difference, continued, as it is supposed it will be, from year to year through life, may be regarded as the consideration for the right to continue the insurance.

As the time for which the party was insured by the actual payment of premiums had expired before his death, the case turns entirely upon the second part of the contract. In respect to that, what relation did the contracting parties sustain to each other? The defendants, for a valuable consideration, made an irrevocable proposition to insure the applicant during life, upon certain terms and conditions. He was at liberty to accept or reject the proposition. If he accepted, he was to comply with the condition and pay the premium on or before a given day. If he neglected to pay within the time limited, according to the letter of the contract, he virtually rejected the proposition, and the contract was at an end.

In terms, the contract is a very simple one. The defendants, in effect, say to the other party, "Pay at the time stipulated and you are insured; omit such payment and our proposition is withdrawn, and your right to insure is extinguished." It is impossible to put any other construction upon it. There is no room for doubt or uncertainty. The payment required is in no sense conditional. The proposition is not, pay if convenient; pay unless sudden sickness prevents; pay unless some unexpected turn of fortune deprives you of the means of paying; pay unless the act of God or the law intervenes to prevent payment; but absolute payment is required. To make it still clearer, the proposition is not, if poverty, sickness, accident, or the law prevents payment, you shall be insured the same as if you had paid. None of these risks were taken by the defendants; they were all taken by the insured. Every word of the instrument, embodying the agreement of the parties, is consistent with this view of the contract, and the whole instrument, when

fairly considered, is inconsistent with any other view of it. It would seem that this analysis of the contract would of itself be a sufficient answer to the plaintiff's claim.

But courts of high standing, both of our sister States and of the United States, have viewed these contracts differently, and have come to a different result. They vary somewhat, however, in the reasons for their conclusions.

The case of Hilliard *vs.* New Jersey Mutual Benefit Life Insurance Company, 35 N. J., 415, interpolates in the contract a provision, that if the law rendered the payment of the premiums impossible at the time, the insured was excused from paying, and might save the insurance by paying it subsequently.

In Hamilton *vs.* Mutual Life Insurance Company, 9 Blatchford, 234, one reason given, among others, is, that the contract imported an agreement by the company to keep an agent in the State where the insured resided—one of the seceding States—during the war; and that the withdrawal of that agency was a wrongful act, which excused the insured from paying and saved the insurance.

In the case of Manhattan Life Insurance Company *vs.* Warwick, 20 Gratt., 614, importance is attached to the local law of Virginia, which, as is held, required the company to keep an agent in that State during the war, to whom premiums could be paid, and that payment to him in one instance, although not strictly in the mode prescribed in the contract, and in another instance a tender of payment during the war, and after the authority of the agent had been, in form at least, revoked, operated to keep the policy alive.

In the case of Clopton *vs.* The New York Life Insurance Company, 7 Bush, 179, stress is laid upon the hardship of the case if the forfeiture is enforced.

We do not attempt to give all the points considered, nor even the substance of the argument; for in all the cases the whole question is elaborately discussed. Other points, however, and some of the arguments will be more fully

noticed as we proceed. A due regard to these various decisions, and others of like import, requires us to examine with care the law bearing upon this case.

1. It will be seen from what has already been said, that we regard the payment of the premiums as a condition precedent to any subsequent liability on the part of the defendants. If this had been an absolute contract by the insured to pay a sum of money by a given time, neither accident, inevitable necessity, nor the act of God, would excuse a non-performance. But if payment was unlawful, that would be an excuse. (School District No. 1 *vs.* Dauchy, 25 Conn., 530.) But that doctrine has no application to a case where it is at the option of the party to do or not to do the thing contemplated. He has a perfect right to do it, or not to do it. He needs no excuse, whatever his action may be. The question is, if he omits to perform, from any cause whatever, does he thereby obligate the other party precisely as he would if he had performed? The answer to this question must be found in the contract itself. By a reference to it, it will be seen that there is nothing in it which gives the slightest indication that such was the intention of the parties, and there is no legal ground on which we can interpolate in the contract such a provision. We venture to say that no precedent can be found for such action by a court of justice, prior to some of the recent decisions upon this subject. If any such exist they have escaped our notice. We cannot, therefore, accept, as sound, the doctrine that the existence of the war, making it illegal to pay the premiums, saved the rights of the party and kept the policy in force.

2. The ground taken, that the late civil war was such an extraordinary event, and so entirely unlooked for, that it will be presumed that it was not contemplated by the parties, and therefore the law will imply a qualification of the conditions in case of war, is hardly tenable. In the first place, the policy itself provides that the insured

shall not, without the previous consent of the company, "enter into any military or naval service whatsoever (the militia not in actual service excepted)." So that, in this case, war was in the minds of the parties, and therefore there would seem to be no room for the supposed presumption. On the contrary, the fact that war is clearly referred to, shows that the parties contemplated a state of war as possible; and the fact that the qualification contended for is not inserted, affords some ground for presuming that the parties did not intend such a qualification.

But aside from this,—assuming that the possibility of a war between the sections was not contemplated by the parties,—is it clear that the law will imply the modification of the contract contended for? In the case of written contracts, the law will imply nothing except what may fairly be presumed to have been intended by the parties. Hence, if an unlawful act is embraced in general words used in a contract, the law will presume that the parties did not intend it, and will imply an exception. A case in one of the English reports affords an illustration. A contract of marine insurance insured against capture. The vessel was captured by the government of the insurer. It was held that the capture, although within the letter of the contract, was not within its true meaning, on the ground that an express contract insuring against such capture would be void as against the policy of the government, and therefore the law presumed that the parties intended that such a capture should be excepted.

But what reason is there for presuming an exception in the present case? It cannot be presumed from the mere fact that the act to be done, which was lawful when the contract was entered into, had unexpectedly become unlawful. That may have been a good reason why the insured, in exercising his right of election, should elect not to pay the premiums; but it certainly affords no ground for presuming that the parties intended in such a case that he should have all the advantages of an actual payment.

The business of life insurance has grown to immense proportions in the last fifty years. During that time it

has engaged the attention of many of the best minds in this country and in Europe. It has been studied from every possible stand-point, and considered with reference to every possible vicissitude in human affairs, including a state of war as well as peace. Every element that enters into the chances of human life, and that affects the risk assumed, has been well considered and re-considered, and the policies of all well regulated companies have been prepared with great care, with a view to express clearly the precise intention of the parties, and to guard the rights of all concerned. With all the light that experience and thought have thrown on this subject, it never has occurred to any one connected with the business, so far as we know or believe, that a clause of this kind was needed to protect the rights of any one. On the contrary, we venture to assert that a life insurance policy containing a provision that in case of war between the government of the insured and the government of the insurer, the policy should be continued in force during the war, without the payment of the premiums, would be unprecedented in the history of life insurance; and if a court of justice construe the contract as meaning that, they impute to the parties a meaning which they did not intend; for it cannot be presumed that any company, managed by intelligent men, would knowingly and understandingly make such a contract.

3. In two of the cases referred to, the decision rests, in part, upon an interpretation of the contract, which injects into it a provision binding the company always to keep an agent in the State in which the insured resided, with authority to receive the annual premiums, and that the withdrawal of the agency was a breach of the contract by the company, which estopped the company from setting up the non-payment of the premiums as a defense. It is not pretended that the policy itself contains any language that will bear such a construction; but the obligation is inferred, partly from the circumstances under which the contract was entered into, and partly from the law of the

State in which the contract was made, requiring all foreign companies doing business in the State to keep an agent there to file certain sworn statements in public offices, &c., and accept service of process against the company.

So far as the present case is concerned, we might dismiss this point with a simple allusion to the fact that the law of South Carolina is not made a part of this case; and that so far as the inference is one of fact it hardly falls within the province of this court. But we choose not to rest our decision upon any narrow or technical ground.

We shall, therefore, assume that the laws of South Carolina in this respect are substantially like the laws of Alabama and Virginia, and treat it simply as a question as to the proper construction of a written instrument, taking into consideration the local law and the circumstances attending the case. The obligation inferred is hardly a proper subject of legal inference. Whether the premiums should be paid in South Carolina or Connecticut, was a matter of indifference to the law. To justify a court of justice in drawing such an inference, the circumstances should be very strong. In this case they seem to be rather weak. The fact that the contract was made with, and the premiums paid to, an agent of the company in South Carolina, coupled with the fact that the insured, with the knowledge and consent of the company, always resided there, affords very slight grounds for presuming that the parties contracted that the defendants should always, and under all circumstances, during the life of the policy, keep an agent there for that purpose. On the other hand, the fact that the parties contracted expressly in reference to the time of payment, and the receipt to be given therefor, and were silent in respect to the place of payment, affords some presumption that they intended to leave that matter to be regulated by their mutual convenience. To us, the latter presumption seems much stronger than the former.

The principal if not the only provision in the statute, which bears upon the question, is that which requires a sworn statement of the gross premiums received for in-

surance by the company at the agency during the preceding year to be annually deposited with the assessor. This was undoubtedly for the purposes of taxation; and is some indication that the legislature intended that the premiums paid by citizens of the State should be paid through the agency, that they might be reached for that purpose. If the legislature intended that, it is a little surprising that they did not express that intention in plain language, instead of leaving it to be implied from language which may, with equal propriety, bear another construction, and be operative without resorting to the implication. This and other requirements of the statute were only operative in case the defendants chose to transact business in the State, and only so long as they continued to do so. There is nothing which, even by implication, requires them to begin business, and there is not enough to justify the inference that they intended to compel the continuance of business when once begun. Taking the statute and the circumstances together, the interpolation of such a provision in the policy seems more like the creation than the construction of a contract.

But let us test this interpretation by its fruits. The agency is continued during the war that the policy-holder may there pay his premiums from year to year. The moment the agent receives it, it is subject to the confiscation act, and immediately finds its way into the confederate treasury. This is conceded; and the learned judge in Hamilton *vs.* Mutual Life Insurance Company of New York, attempts to evade the force of it by suggesting, on page 256, that the insured "could have tendered the premium, and the agent could have refused to receive it because he could not remit it, and because it would be confiscated." In that event, we apprehend that a shrewd and sagacious government would not have been long in discovering that the insured held funds belonging to a northern institution; and vigilant collectors would soon have destroyed all hope that he could keep them for the benefit of the creditor until after the termination of the war. If the confederate government had determined to

devise a plan by which they could draw funds from the loyal people of the North to aid in carrying on the rebellion, they could hardly have devised a more ingenious or more successful one than this. The success and magnitude of such a scheme will be apparent when we consider that probably every life insurance company in the country had agencies in the seceding states; and that the number of policy-holders was so large as to justify the belief that the flow of money through this channel into the treasury of the confederacy would have been constant and unremitting. And then, to trace results still further, after the termination of the war, and the policy-holders have paid to the rebel government the premiums for four successive years, suits are brought on the policies, and courts of justice are gravely asked to hold the companies liable, and that too without any abatement on account of the premiums which the companies did not receive. Such are some of the consequences to wh. h this argument inevitably leads.

But again; let us briefly consider the effect of the war upon such a contract as is here contemplated. It is now supposed to be a contract containing mutual obligations. The defendants undertook to keep an agency in South Carolina, and the insured, if he would continue his policy, undertook to pay his premiums at such agency. It must be remembered that the obligation to keep an agency is inferred partly from the previous course of business, and if it exists at all it obliges them to continue the agency during the war substantially as before. It must also be borne in mind that it is not a rule for an isolated case, but it is applicable to all life insurance companies, and all their agents, and to every policy in the seceding states. In theory, and before the war such it was in fact, the business of the agency is to negotiate and secure new policies and receive premiums as they become due on outstanding policies. The agents are required to report their proceedings, and make remittances at short intervals to their northern principals and receive instructions from them. Practically the whole business of the agency

is interrupted and destroyed, and the agent is reduced to a mere figure-head without duties or powers, to whom each policy-holder may annually go through with the form of tendering his premium. Every possible advantage to the company from the agency is destroyed, and the agency, which is judicially required, is radically and essentially different from anything which either party ever contemplated. Is that just? Is it not much more reasonable to hold, and does it require any argument to show, that such a contract is entirely abrogated by the war? Every argument and every reason that can be urged for the abolition of a contract of partnership or of affreightment applies equally well to such a contract as this. It becomes a contract of continuing performance in the strictest sense.

4. But it is said that the non-performance of a contract will always be excused when the intervention of the law forbids one party from performing and the other party from receiving performance. This is doubtless a sound proposition. But the difficulty is, it does not aid the plaintiff. The real question is, not whether the party is excused from performing, but what are the consequences of not performing? In one of the cases the court says: "Their" (the defendants) "inability to receive the premium when due amounted to the same thing as if said premiums had been actually tendered and the defendants had refused to receive them." With all deference we submit that this cannot be true as a general rule. No case occurs to us in which it would be true when applied to an unconditional contract. To illustrate: a man contracts to erect for another a wooden building at a given place on or before a given day. Before performance the act becomes unlawful, by city ordinance, for example, forbidding the erection of wooden buildings in that locality. Non-performance would certainly be excused, but his legal excuse would give him no right under the contract. No action could be maintained against him for not erecting the building, and it is equally true that he could maintain no

action against the proprietor for the price agreed to be paid, nor for damages for not permitting the erection of the proposed building. The law having annulled the contract, both parties are absolved from all obligation under it. Therefore it is not true that the parties would stand as they would, if performance had been lawful, and there had been a tender of performance and a refusal. Neither is the proposition a sound one in its application to the case under consideration. Let us lay aside the existing insurance, and consider the contract solely in reference to the future. The defendants say to the insured, "pay us so much money on or before a given day, and we will insure your life a given sum for one year from that day." The defendant's undertaking is a conditional one. If the other party does not pay no obligation attaches. Before payment, and on the day named, the law absolutely prohibits the one party from paying, and the other party from receiving pay. It cannot be true that that would be equivalent to payment; or, assuming that there is no legal impediment, a tender of payment and a refusal. If it is, then the law excuses one party from paying the consideration, and yet gives him the benefit of the contract precisely as if he had paid. It deprives the other party of the consideration, and converts a conditional promise into an absolute one without performance of the condition.

It is no answer to say that the premium may be subsequently paid, or allowed when the policy is collected. The parties have a right to make their own contracts, and courts have no power to vary them, or make contracts for them. They have fixed the time of payment and made it material. *Time is of the essence of the contract.* The law will no more postpone the payment in such cases than it will deprive the party of it entirely. In this as in unconditional contracts, the law having intervened to prevent performance, there is no contract and no liability attaches to either party.

The only possible answer to this view of the case, that we can conceive of, is, that the insured had a vested

interest in subsequent insurance in consideration of the premiums paid for the preceding years, of which the law will not deprive him. If the law is driven to the alternative—either to destroy that right or vary the contract, or rather make a new one for the parties,—we submit that the former is less objectionable than the latter. For the latter we have no precedent, and there is no limit to the mischief which will follow the introduction of such a principle into our system of jurisprudence. In respect to the former, it is neither the first nor the only instance, in which war destroys private rights and vested interests. But no such alternative exists. It is not strictly correct to say that the law deprives the insured of a vested right. The law simply enforces, according to its letter and spirit, the contract which the party made. If that works a forfeiture, the hardship is attributable to the contract and not to the law. Neither the defendants nor the law guaranteed that performance by the insured should always be lawful.

Thus far in considering this point, we have assumed that the law directly prohibited the payment of this premium. But such is not the fact. Payment in itself considered was not unlawful. The law simply prohibited intercourse between enemies. As a consequence payment which required such intercourse was prohibited. If payment could be made without such intercourse it was perfectly lawful. Such payment was certainly possible. Had the insured come into the northern states and remained here, or employed an agent, as he had an opportunity to do,—for war, as a coming event, cast its gloomy shadow before, especially in South Carolina,—he, or his agent, might have paid, and the defendants might have received, the premiums without the violation of any law whatever. We cannot, therefore, attribute to the law, consequences which the party, by his own act, has brought upon himself.

5. In Clopton *vs.* New York Life Insurance Company, 7 Bush, 179, the court attaches importance to the supposed

hardship of a forfeiture. It says: "However lawful the conditions of avoidance, as prescribed in this case, may be admitted to be, it is in effect a forfeiture which ought not be favored. To subject to forfeiture all the premiums paid, as well as the five thousand dollars for the loss of life, would be harshly and unreasonably penal for no better cause than the inevitable non-precise payment of another installment of premiums, which the law prevented the appellant from a right to receive. None of the parties can be presumed to have contemplated such disabling war, or to have intended, by the condition of avoidance, more than voluntary failure to pay when there was legal ability to receive the premiums."

The rule of law that forfeitures are not favored is a salutary rule, and we have no disposition to weaken its force. We should be careful, however, to guard against its misapplication. In respect to contracts, it is usually, if not universally, applied to cases in which the party, by doing or omitting to do some act, forfeits an estate or a sum of money, *in addition to losing the advantages of the contract.* This is the first instance within our knowledge in which it has been applied to give the party the benefit of the contract without performance on his part. We contend that this is not such a forfeiture as calls for or admits of the application of the rule. One man cannot forfeit the property of another. The thing forfeited must be his own. The argument assumed that the plaintiff had a vested right to the sum insured for; whereas he had no such right, not even contingently, unless he continued to pay the premiums. In this case the insured failed to pay the premiums, consequently he had no vested right to the insurance. Therefore, there was no forfeiture, in the proper sense of the word, in respect to that.

The court also speaks of forfeiting the whole amount of premiums previously paid. This is only partially true. To a considerable extent he received a valuable consideration for the amount paid, in the risk which the company assumed during the time the policy was in force. So that the real loss by a failure to pay is comparatively small.

And the possibility of such a loss must be presumed to have been in the minds of the parties when entering into the contract, and considered by them accordingly. The possibility of a failure to pay was provided for in the provision in such case, that "all payments made thereon shall be forfeited to the said company." In a hazardous contract, that was a risk which the insured assumed. It is not, therefore, such a forfeiture as courts of equity will relieve against, much less will courts of law make a contract for the parties for the purpose of avoiding it.

Again. If this principle is to be applied to life insurance policies, there is no reason for limiting the application to cases of war. There is the same hardship, and, therefore, the same propriety in applying the rule, to cases where the party, by accident, misfortune, or inevitable necessity, fails to pay the premiums. To apply the rule in such cases would make the companies insurers against all such contingencies, and that certainly will not be seriously claimed. This rule, too, if applicable at all, must be applied in all cases, whether few or many premiums have been paid. There is no room or reason for a distinction between the payment of one and many, except that each payment slightly increases the value of the right acquired. If but a single payment had been made, would any court seriously consider the propriety of straining the law or the contract for the purpose of saving a forfeiture?

But this is not all. The application of this doctrine to cases where the payment of the premiums has been interrupted by war, fails to take a comprehensive view of the question at issue. It looks only to the immediate parties to the suit, and regards the policy as an isolated transaction; whereas, in fact, it is but one act,—a small fraction, indeed—of a vast system of business. It is a business, too, which is based upon a calculation of chances and a system of averages. The average duration of any number of insurable lives may be estimated with tolerable accuracy, and each person, of whatever age, in a healthy condition, has his "expectation of life," which is known

and relied upon. Some exceed, and some fall short of the average. Hence, some pay more, some less; but the sum insured is the same, whether few or many premiums are paid. The company receives on one policy, in premiums and interest, more than it pays; on another, much less; but individual policies are not regarded; it is the average duration of life and the result of the business as a whole.

The proportion of those who will allow their policies to be forfeited is also a matter of calculation, and can be determined in advance with reasonable certainty. It is doubtful, however, whether these forfeitures operate in the end to the advantage of the companies. As a rule, the policies which lapse are the best risks for the insurers. As they drop out, the average of those which remain is materially reduced. But whether they gain or lose is not material. In ordinary times, the consequences of forfeited policies can be anticipated and provided for. The late war caused all policies subject to its operation to lapse temporarily. It will probably be found that a few only returned to pay their premiums at the close of the war. Of those, most, if not all, are cases in which the insured either died during the war, or survived it in impaired health. The application of the rule we are now considering to this class of cases, therefore, practically revives only the very worst risks for the company, and compels it to submit to the loss of all the better and more desirable risks. A court of justice should never relieve one party of a hardship, apparent or real, at the expense of the other. By so doing, possibly the court may impose a greater hardship than the one it relieves. If the contract relations of two persons are such, that one or the other must suffer a hardship,—each party being equally free from blame,—the law will leave it precisely where the contract places it.

Let us consider the consequences of this doctrine to a single company. A large number of policies, many thousands perhaps, were outstanding in the seceding states. Some policy-holders, doubtless, lost their lives in the field. In respect to them, the company is exempt from

liability. Others were non-combatants. Of these, some, probably a small part of the whole, died during the war, or since. In all such cases, especially where the premiums were paid or tendered immediately after the war, the company will be called upon to pay the insurance. But in the greater number of cases, where the holders of policies survived the war in health, the company has no means of compelling them to revive their policies and pay the arrearages of premiums, but must content itself in seeing them exercise their right of election by refusing to continue the old policy, and taking a new one, thereby saving several years' back premiums. Now, if some means could be devised whereby all the policies held by non-combatants could be revived at the close of the war, and the payment of arrearages be compelled, there would be some justice in holding the company liable in those cases where the policies have terminated by the death of the insured. But a rule of law which revives and enforces all those policies in which all the advantages are against the company, and leaves null and void all those policies in which the advantages are in favor of the company, is neither reasonable, befitting, nor just.

6. One other question remains to be considered. To what extent was this policy abrogated by the war? The general principles of international law, which determine the effect of war upon existing contracts, are well established, clearly defined, and not difficult of application. In the case of the Rapid, 8 Cranch, 155, Johnson, J., in speaking of the nature and consequences of a state of war, says: "On this point there is really no difference of opinion among jurists; there can be none among those who will distinguish between what it is in itself, and what it ought to be under the influence of a benign morality and the modern practice of civilized nations. In the state of war, nation is known to nation only by their armed exterior; each threatening the other with conquest or annihilation. The individuals who compose the belligerent states exist, as to each other, in a state of utter occlusion.

If they meet, it is only in combat." After speaking of some rules which have been introduced into modern warfare, and which owe their existence altogether to mutual concessions, he adds: "On the subject which particularly affects this case, there has been no general relaxation. The universal sense of nations has acknowledged the demoralizing effects that would result from the admission of individual intercourse. The whole nation are embarked in one common bottom, and must be reconciled to submit to one common fate. Every individual of the one nation must acknowledge every individual of the other nation as his own enemy, because the enemy of his country." Again, on pages 162–3, he says: "But the object, policy, and spirit of the rule is, to cut off all communication or actual locomotive intercourse between individuals of the belligerent States. Negotiation or contract has, therefore, no necessary connection with the offense. Intercourse inconsistent with actual hostility is the offense against which the operation of the rule is directed; and by substituting this definition for that of trading with an enemy, an answer is given to this argument."

In Griswold *vs.* Waddington, 16 Johnson, on page 479, Chancellor Kent referring to the case of the *Rapid*, says: "Here then we have the final consummation of this discussion, and the sanction of the doctrine we have been tracing, solemnly given by the highest judicial authority in the United States. It reaches to all interchange, or transfer, or removal of property, to all negotiations and contracts, to all communications, to all locomotive intercourse, to a state of utter occlusion, to any intercourse but one of open hostility, to any meeting but in actual combat."

In the case of the Julia, 8 Cranch, 181, Judge Story is equally explicit. On page 193 he says: "At the threshold of this inquiry, I lay it down as a fundamental proposition, that strictly speaking, in war, all intercourse between the subjects and citizens of the belligerent countries is illegal, unless sanctioned by the authority of the government, or in the exercise of the rights of humanity.

I am aware that the proposition is usually laid down in more restricted terms by elementary writers, and is confined to commercial intercourse."

Again, on pages 194–5, he says: "But independent of all authority, it would seem a necessary result of a state of war, to suspend all negotiations and intercourse between the subjects of the belligerent nations. By the war every subject is placed in hostility to the adverse party. He is bound by every effort of his own to assist his own government, and to counteract the measures of its enemy. Every aid therefore by personal communication, or by other intercourse, which shall take off the pressure of the war, or foster the resources, or increase the comforts of the public enemy is strictly inhibited." * * * * "The ground upon which a trading with the enemy is prohibited, is not the criminal intentions of the parties engaged in it, or the direct and immediate injury to the state. The principle is extracted from a more enlarged policy, which looks to the general interests of the nations, which may be sacrificed under the temptations of unlimited intercourse, or sold by the cupidity of corrupted avarice."

We are aware that there is a tendency in modern times to soften the rigors of war, and relax the principles of international law, so far as they effect private property and rights. On this subject Chancellor Kent, in Griswold *vs.* Waddington, says: "It is the business of government, and not of courts of justice, to relax the rules of war. The power that declares, or carries on war, may soften its evils, to every extent consistent with the public interest, of which it is, in this instance, the exclusive judge. It is its bounden duty to make war fulfill its end with the least possible mischief, and to hasten the blessings of peace." This is sound doctrine and throws all the responsibility where it properly belongs—upon the war making power. It is the business of the courts to administer international law, and not to relax or modify it according to their notions of propriety. It is much wiser and safer to leave that matter with the power that

makes and carries on war. But we need not dwell longer upon the general principles which govern this case.

The law as stated above is pretty uniformly accepted by the modern cases as the established doctrine of this country. They differ somewhat in its application. The difficulty in applying it to a policy of life insurance arises from the complex nature of the contract. There are cases which regard it as a contract of continuing performance, and therefore dissolved by war. Others consider it a contract of periodical performance, and affected as the payment of a debt is, suspended or postponed until after the war. On this point there has been much discussion. We regard it as immaterial whether it is called by one name or another. In terms it requires certain acts to be done annually, or oftener. On each act future rights and obligations depend. It neither begins nor ends, but continues a contract, and one which contemplates future acts of performance by both parties. As a rule each act requires intercourse, or communication between enemies, whenever the parties to it are citizens of belligerent states. War therefore dissolves the contract so far as it relates to insurance which depends upon the payment of the premiums after the commencement of the war.

The theory that the premium as it becomes due is a *debt*, is a fallacious one, and leads to erroneous conclusions. It resembles a debt only in that it is a payment of money. A debtor is under obligation to pay; here no obligation exists. The payment of a debt may be compelled; payment of the premium is entirely optional with him who is to pay. The intent accompanying the act, the object aimed at, and the consequences resulting therefrom, are essentially and radically different in the two cases. The one discharges an obligation previously existing, and closes the transaction between the parties; the other creates an obligation which did not previously exist, continues in force an existing contract which otherwise would have terminated, and contemplates future dealings between the parties. While it is in form the payment of money, it is in substance the making of a

contract. The payment of a debt is only suspended; the making of a contract is prohibited by the war.

Is the contract executed or executory? Is the payment of the annual premiums a condition precedent or subsequent? On these points there has been little discussion. Courts have assumed one answer or the other, in reply to each, according as their decision has been for or against the company. Perhaps a categorical answer either way would not be strictly correct. In the case before us the premium was paid to January 14, 1862. Up to that time it was an executed contract. No further act was required by either party. Had death intervened, the contract for future insurance would have ceased to exist, and nothing would have remained but to prove the death and pay the money—acts which pertain to the remedy. To that extent the contract was not dissolved by the war. By entering into the contract and paying the first premium the party acquired a right to continue the insurance during life. In that respect also it was an executed contract, and the party received all he contracted for—a mere right or privilege, which was unavailable, and without value, unless he complied with the conditions. The law prohibited him from complying, and therefore destroyed the right, precisely as it forbids the contract of partnership, or affreightment, and thereby destroys the rights of the parties under it.

In relation to insurance after January 14th, 1862, which is the point that concerns this case, it is different. There is a manifest distinction between a *right to insure* and *actual insurance*. There was no actual insurance, and the party could obtain none, except by complying with the conditions,—an act to be done by him. It was an executory contract on his part, and the law preventing the execution of it by him, the contract was necessarily dissolved.

As to the nature of the condition. It has no reference to present insurance; that is unconditional. The right to future insurance is an existing right, which may be defeated by non-payment of the premium. As to that, it is clearly a condition subsequent. But the right is of

such a nature that its existence absolutely depends upon payment. Future insurance is not an existing fact, and cannot exist, except upon the payment of the premium. As to that, it is as clearly a condition precedent. The war, preventing its performance, dissolved that part of the contract.

There are cases on this subject in which the courts have come to the same result that we have; but we have not deemed it necessary to notice them at length. Tate *vs.* New York Mutual Life Insur. Co. U. S. Dist. Court of Tennessee, by Emmons, J. Dillard *vs.* Manhattan Life Insurance Company, 44 Georgia, 119. We are aware that the Court of Appeals in New York has taken a different view of the question. Cohen *vs.* New York Mutual Life Insurance Company, 50 N. Y., 610. Sands *vs.* New York Mutual Life Insurance Company, 50 N. Y., 626. Martine *vs.* International Life Insurance Company, 53 N. Y., 339. They rely, however, to a considerable extent, upon the authority of the cases we have been considering. Not being satisfied with the reasons given in those cases, we have not regarded them as binding upon us, but have felt at liberty to consider the case upon principle, especially as we have been informed that the question has been before the Supreme Court of the United States, and no decision rendered as the Court was equally divided.

We advise the Superior Court that the demurrer should be sustained.

UNITED STATES OF AMERICA

Circuit Court of the United States

FOR THE WESTERN DISTRICT OF TENNESSEE.

W. E. TAIT, *et al.*,
HEIRS OF DR. SAMUEL BOND, DECEASED,
vs.
THE NEW YORK LIFE INSURANCE COMPANY.

Opinion of Emmons, J.

HUMES & POSTEN,
For Plaintiff.

RANDOLPH, HAMMOND & JORDAN,
For Defendants.

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1873.

Circuit Court of the United States

FOR THE WESTERN DISTRICT OF TENNESSEE.

W. E. TAIT, *et al.*, HEIRS OF DOCTOR SAMUEL BOND, DECEASED,

vs.

NEW-YORK LIFE INSURANCE COMPANY.

A policy of insurance, which idemnifies a public enemy against loss in time of war, is unlawful; and where entered into before hostilities, is abrogated when they occur. The relations it establishes are illegal between belligerents.

Where a life policy provides that it shall be void upon the non-payment of premiums within the time prescribed, such payment is a condition precedent; time is of the essence of the contract, and there can be no recovery if punctual payment is omitted.

Where the performance of a condition precedent becomes unlawful, or by the act of God, impossible, this will not authorize a recovery upon the contract without performance. Such case distinguished from those in which subsequent impossibility and illegality are relied upon as a defence.

A contract of insurance, the continuance of which depends upon the election and acts of the insured, is not like a debt, the obligation of which is absolute, and which is suspended only by war.

The relations between the members of a corporation for mutual insurance present all the evils, and are dissolved by war for the same reasons as those between ordinary copartners.

The reasons for the dissolution of executory contracts by war are not alone that such contracts involve intercommunion across the hostile lines, or that they relate to property liable to capture; but more especially because their execution increases the resources of the enemy.

A court of equity has no authority to decree the specific performance of an agreement in favor of a party who has failed to perform a condition which is of the essence of the contract, although prevented by its becoming subsequently illegal or impossible by act of God.

A court of equity will not relieve a party from the effect of omitting to perform an act, although the omission was caused by subsequent illegality or impossibility arising from the act of God, where such act was merely optional, and the other party had no right to enforce its performance.

The agency of one representing an insurance company, authorized to receive premiums and renew policies, becomes unlawful when the insured and insurer become public enemies.

The plaintiffs in this case are the legal representatives of Dr. Samuel Bond, who died August 8th, 1862. The facts upon which the principal questions of law in this case rest, are as follows: Dr. Bond, in his lifetime, viz.: on 17th October, 1854, procured a policy of insurance upon his life for the sum of $5,000, from the defendants, the New York Life Insurance Company, then and now a corporation for mutual insurance, organized and doing business under the laws of the State of New York, and having its home office in the city of New York. Dr. Bond then was, and continued until his death, a resident of the State of Tennessee. The policy was issued in the usual manner from the home office of the company in

New York, the application being made and the policy being transmitted through their then local agent (J. B. Kirtland) at Memphis, Tennessee. By the terms of the policy the insured was to pay an annual premium of $224.50 on the 17th day of October in each year during the continuance of the policy; and upon his compliance therewith the defendants were at his death to pay to his representatives the amount of the policy. Amongst other things the policy also provided, that in case the insured "shall not pay the said premiums on or before the "several days hereinbefore mentioned for the payment "thereof, then, and in every such case, the said company "shall not be liable for the payment of the sum insured "or any part thereof, and this policy shall cease and "determine." The annual premiums were duly paid at maturity by the deceased to the local agent at Memphis, up to and including the year 1860; the last payment being made in October of that year. Kirtland continued to act as the agent of the company at that point until sometime in July or August, of the year 1861, when all intercourse between the people of the state of Tennessee and those of the loyal states was cut off by the breaking out of actual hostilities; whereupon he ceased to act further as such agent, and has never since acted in that capacity. On or before the 17th of October, 1861, a tender of the premium due in that year was made, on behalf of the insured, to the former agent, Kirtland; which tender was refused. Kirtland then had no receipts for the said premium, signed by the home officers of the Company, in his possession. The officers of the Company had no knowledge of the tender until after the death of Dr. Bond, nor did they ever communicate with Kirtland in reference to the same. The powers and duties of the agent sufficiently appear in the opinion of the Court. This suit was brought in October, 1869, to recover the amount of the insurance, less the unpaid premiums.

Emmons, J. This is an action upon a policy of life insurance. The policy was issued some years before the war, and the premiums paid to 1862, when the agency at Memphis ceased in consequence of the war. A tender was afterwards made in due time to the former agent, of all sums due before the death, which was in that year. The contract contains the following clause: "It is the "true intent and meaning hereof that if the insured shall "not pay the said premiums on or before the said days, "together," etc., this policy "shall cease and determine." Across the face of the first and all other receipts taken by the assured for the premiums paid, is printed conspicuously, in large type of italics and capitals and in red ink, the following: "Premiums not paid WHEN DUE ac- "cording to the terms of the policy, ANNULS the same, "but it MAY be renewed at the HOME office within a rea- "sonable time, upon satisfactory evidence of good health "being furnished." The acts by which alone the policy can be continued in life, involve not only the exercise of continuous active duties on the part of agents, but constant intercommunion across the hostile lines. Every receipt, in unambiguous terms, tells the insured no payment is good unless the party who claims the right to accept it holds an authenticated form, signed by the President, Vice-President or Actuary, which necessarily must be transmitted from the *home* office to the local agent from time to time as it is required. There is no general power to receive premiums without this special warrant, issued in each instance. The object of this precaution is manifest: it is so necessary to the prosecution of the scheme, and is so dependent upon regular communications between the agent and the chief officers, that when the latter are interrupted it necessarily follows that the payments, without an alteration of the

contract, cannot be made. A life insurance agent who should not make his periodical returns and remittances would be an anomaly. Should a corporation fraudulently or negligently omit to forward the annual receipt in violation of duty under the policy, or by its wrong in any manner prevent performance on the part of the insured, different principles would apply, and a recovery at law or in equity according to circumstances be given.

The only argument submitted by the learned counsel for the plaintiff consists in the citation of the following four cases: 20 Grattan, 614, Manhattan Co. v. Warwick; 9 Blatchford, 334, Hamilton v. Insurance Co.; 59 Barb., 556, Sands v. Insurance Co.; and 7 Bush, 179, Life Insurance Co. v. Clopton, and a dictum in 42 N. Y., 54, Robinson v. Insurance Co., which expresses a doubt as to the entire clearness of the position that war abrogated the agency. Since the rendition of our judgment, but before the preparation of this opinion, two other decisions, by an influential tribunal, have been added to the list of those which oppose our own. Cohen v. Insurance Co., 50 N. Y., and Sands v. Insurance Co., ibid. These decisions, if acquiesced in, would, each for quite varying reasons, entitle the plaintiff to judgment. But for them we should have deemed the question whether an insurance company, created and protected by the government, located in and drawing its funds from the loyal region, could continue a policy upon life for the benefit of an enemy as unworthy of argument. We should have confidently held that a state of belligerency dissolved the contract.

That these judgments are at war with the universally received opinion before their pronunciation, we think clear. Another case, however, upon a kindred subject (Kershaw v. Kelley, 100 Mass., 561), by a Court of exceptional learning and repute, quite as much at variance with received opinions, shows there is a pretty common disposition to refuse the application of old and familiar

doctrines to the exigencies of our late contest. But we find in our Supreme Court no indication of a disposition to relax that portion of the laws of war which affects the contracts and business relations of belligerents. Believing there is no judicial authority anywhere, to so far modify the law as to preserve in force this contract, we hold it was abrogated the moment the insured and insurer became public enemies.

The counter-judgments vary greatly in the grounds on which they proceed. Without referring each reason to the decision which asserts it, the leading ones are generally as follows. They are here stated that the occasion for much of our own discussion, which might otherwise seem unnecessary, may be perceived. It is said that *contracts* and *business relations* between enemies are lawful, so as actual personal intercourse, between persons in the different territories, is not necessary; and consequently, a business already commenced under an agent, may be continued if he makes no remittances or communications to his principal. The continuance of a life policy and the agency is thus supported. Some of them, overlooking the palpable difference between the duties of an insurance agent and of one to receive a debt, and between the latter and this peculiar contract, requiring for its continued vitality so much affirmative action, continue both upon the same principle. It is said that all the cases and elementary books heretofore announcing the broad doctrine that an insurance of enemy's property is void, and that war abrogates those entered into before it, refer solely to insurances upon *maritime* commerce, where the subject was not only liable to capture, but employed in unlawful trade and intercourse between the hostile countries, and the insurance void *therefore*, and not upon the ground that it was opposed to public policy to guaranty against the loss of enemy's property generally, but only where it was so employed, and where it was, by the general laws of war, subject to confiscation. That houses,

inland-stored goods, and the lives of non-combatants did not come within the reason of the rule, and might be lawfully insured through resident agents, and belligerency did not in such cases terminate existing policies. Some of them take the broad ground that the punctual payment of the premium is not a condition precedent. Others, conceding that it is so, decide that payment is excused on account of the illegality or the impossibility of performance. Two of them maintain the extraordinary position that the revocation of an agent's power after he becomes a public enemy is a fraud by the loyal company, and estops it to deny the reception of the premiums. And finally, it is ruled that a court of equity will relieve the insured from the duty of performance, upon the ground that the accidents of the war constitute an excuse for non-performance. These do not exhaust the grounds, but they are the more prominent ones.

The principle that contracts, the continued execution of which during belligerency is opposed to national policy, are abrogated by war, is universally conceded. With the single exception of Kershaw v. Kelley, all admit also, that such policy would be violated by the making or continued execution of any contract which directly increased the material prosperity and power of the enemy. Differences of opinion only exist in reference to the application of this rule to policies of insurance upon the life of a public enemy. Authors and cases which discuss the general rule will be referred to, therefore, only for the reasons by which they support it, and the circumstances to which they have applied it. We think it will appear that the policy before us is abrogated by the rule; and that the distinctions relied upon are wholly excluded by the reasons upon which it rests. There are two main propositions upon which the controversy turns: *First.* Is the continued execution of a life policy inconsistent with political interests? *Second.* Is the payment of the premium during war a condition

precedent to recovery? These two questions are all that are material to this decision.

The general rule is, that all contracts and intercourse of every description are prohibited during war; and that those agreements, the execution of which increases the power of the enemy, are wholly annulled, and the parties reciprocally discharged from their performance. This generality would include the contract before us. But exceptions have been created to its application, and within these it is contended this case comes.

Relying upon Deniston v. Imbria, 3 Wash., 396, and Ward v. Smith, 7 Wall, 447, it is said that debts are suspended, not discharged; and that this is but a debt. The distinction between the two is obvious. Where the consideration has been received and the obligation to pay is complete, no new act or volition, and no continuing business activity is necessary. By suspending all these the debt, without national injury, remains. Under a policy of insurance, when carried out according to the very intention of the parties, and in the only mode compatible with the financial scheme upon which it depends, the most continuous and intimate business relations and intercourse are indispensable. No local agent ever is, or in common prudence can be, trusted for years to receive payments without remittance. Such is their number and widespread localities, that it has been found absolutely necessary to evidence their authority of receiving payment by periodical transmission of authenticated vouchers. These are never sent unless the home office has received full reports of the agent's doings and a satisfactory accounting for all the premiums before then payable. When a premium is tendered in due time, if any violation of the terms of the policy by the insured has become known to the agent, it is his duty to decline receiving the premium, report the circumstances to the home office and await instructions. And when a death occurs the important duty devolves upon the agent of receiving and

transmitting to the home office the proofs required to show that the terms of the policy have been complied with by the deceased, and that his death did not result from any of the numerous causes excepted from guaranty by the policy. And although the agent has nominally no authority to allow or disallow a claim, he is, in fact, always relied upon to detect and report any suspicious circumstances which may exist in reference to the death or the character of the proofs, so that, to a very great extent, it rests with him to determine whether the claim shall in any case be contested. It is simply monstrous to suppose that the loyal members of this great scheme are compelled by law to confide this delicate function to a public enemy, who is to exercise it in favor of his fellows in rebellion. The rule would be as unjust as its exercise would be illegal. These forms and duties are well understood by the parties, and constitute a part of the contract between them, and are intended to be specifically and exactly performed. They cannot be so performed without much intercommunion across the lines. To dispense with them is to change the whole nature of the scheme, and involves an unprecedented and wholly unwarrantable interference with the substantial terms of the agreement.

We have no great motive for combating the doctrine which some of these cases hold, that it is from enlightened Christian principle that, in modern times, debts are not confiscated. We shall, however, better appreciate the rule we are considering, and shall apprehend its true spirit, if we understand that from its inception it has always been aimed solely at the destruction of the enemy and the protection of the home government. When debts are held to be suspended only, it is as purely a political and mercenary policy as that which forbids the continued performance of an executory contract. It is in the interest of home commerce after peace. It is the same motive which leads a nation, when the subjects of

a hostile government own portions of its funded debt, to suspend the debt, and even pay the interest upon it till the return of peace. A nation draws but little upon the New Testament when its statesmen omit a policy which would destroy its credit with all the nations of the earth. It could not borrow a dollar from the subjects of neutral countries after it had confiscated the property of its temporary enemies, in its public funds. Commerce would be impossible, if upon each occurrence of war, private debts were confiscated. A more suicidal policy could hardly be pursued. These are limitations upon every nation's power of injury, which have sprung, not from the pulpit, but from the workshop and the counting-house. While nations still recognize as lawful incidents of war the bombardment of cities and the reducing of its women and children to distress, and the taking of human life, it seems almost whimsical and grotesque to attribute the protection of bills and bonds to Christian principle. They are nevertheless, in fact spared; and whatever may be the motive, the question equally remains, whether the limitation which exempts them is applicable to the exigencies of this record. Do the latter present a case analogous to a complete existing debt? Or do they constitute an executory contract, the continued performance of which, during war, has so frequently been declared unlawful? Like injuries, in some degree, undeniably exist in instances where the law spares the relation, as in those where it annuls it; and some of the benefits secured in exigencies where the rule has been applied would undoubtedly be secured in others by extending it. We cannot now, nor has it ever been attempted, establish a principle the reason of which will, in every instance, guide us in decision. But a line has in fact been drawn, including some and excluding others, as political policy balancing benefits and evils, has deemed the one or the other to predominate. What we affirm and shall attempt to show is, that what is historically established brings the

contract before us within the rule which abrogates the contract. A leading, if not the most important, motive for the prohibition, is to prevent the increase of the material power of the enemy. This is equally accomplished by the creation of a new debt, which constitutes a credit upon which the enemy can procure supplies, as by the creation of the products themselves. That this benefit to the enemy is the leading idea, and not solely the prevention of intercourse, is proved from the frequency with which every nation at war, from time to time licenses trade with the enemy in such articles as its necessities demand. (See Wheaton on International Law.) The assumption on the part of the government is, that all trade not so authorized is for the benefit of the enemy. At least, it invariably reserves the power, in all cases, of determining whether the trade will be of more benefit to itself than to the hostile government. This balancing of benefits is the test. While the whole power of the nation is exerted to cut off their supplies, and reduce to want and suffering the entire hostile nation, it would be absurd to suffer its efforts to be counteracted by allowing its subjects to perform agreements which would produce or increase what it is endeavoring to destroy; and this we understand to be the essence of the rule.

It is wholly immaterial so far as this consequence is concerned, that the agreement is made, or the business relation created, before hostilities. A northern citizen, engaged before the war in carrying on a southern plantation or the manufacture of iron, cloth or leather, through local agents with ample power to bind him by executory contracts, could not lawfully continue these avocations during hostilities. In reference to all these he would become a public enemy. It is paradoxical to say that a loyal citizen's relations to a business are lawful, the products of which become enemy's property. This is distinctly said by Kent, Story and Sir Wm. Scott, as we

elsewhere show. If such agent had entered into contracts for the reception and manufacture of materials highly useful to the rebel government, it is but an absurdity to say that, because he was appointed before the war, and no intercommunion was necessary, he was either compelled or authorized to carry out the contract; or that the loyal citizen should be subjected to damages because he did not.

A marked difference in the relations existing between enemies under this policy of insurance, and those of ordinary debtors and creditors is, that in the latter the obligation is full before the war. No new value or source of credit is placed in the hands of an enemy during its progress. Here, no obligation whatever exists, but a debt is created by much mutual activity and elections between the parties. A source of credit, and a power of purchase with its proceeds, is thus originated. A value is created, which would have had no existence in the hostile country but for the action of one of the very enemies whose government has the power of seizing it. In the instance of a debt paid over to a local agent, no increased obligation, or value of any kind, is subordinated to the hostile state. The debt is equally in its power, whether in the hands of a debtor or paid over to the agent. The debtor only is changed, both residing in enemy's territory. They are so wholly unlike in their circumstances and in practical, financial results, that the same rule should not be applied to each.

The accident in this case, that the rebel government did, in fact, confiscate all debts due from loyal citizens, would render the payment of these premiums unlawful, even if it be conceded that, had a different policy been pursued, it would have been otherwise. When the act of an enemy creates a value which, *eo instanti*, passes to the enemy's treasury, that it does so is an additional reason why it is unlawful to continue the agreement under which it took place.

Among other reasons for not abrogating this contract, conspicuously urged in this series of judgments, is that the sum insured will not be paid till after the return of peace. It will not therefore, it is said, furnish material aid to the enemy. This position is a concession that if it does so, it ought, upon principle, to abrogate the contract. But a thousand policies due against solvent companies are among the most certain sources of future payment which could be placed in the hands of our enemies. This is self-evident, and cannot be rendered plainer by illustration. It would seem singular that a financial fallacy so transparent, as that these obligations are not present aids, should have been resorted to at all. But it is still more singular that it should be reproduced, after having been overruled again and again in the series of judgments which hold that marine policies are annulled by hostilities. In three of the English judgments hereafter cited, this argument was made at the bar; and was answered by the Court, that the obligation was present capital in the hands of the enemy. And it was upon this reason, more than any mere intercourse which was promoted by the insurance, or anything in the nature of the subject matter insured, that the judgments were rested. The leading idea in all these instances is, *benefit to the public enemy.*

Subject matter of insurance, or cause of loss, is of comparatively little consequence. In the single instance of insuring one subject to be called into the army, there would indeed, be the additional impolicy of making him more ready to go there. But in a case where the policy forbids military service, such conditions need not be considered. In all other instances, the financial result, the injury to the home government, and the additional power and source of credit given to the enemy, is precisely the same. Whether the insurance be upon ships, upon mills and manufactories in the enemy's territory, or upon the life of a non-combatant; and whether the property and

life is destroyed by fire, tempest, or the casualties of war, through raids or sieges; the same sums, in precisely the same legal conditions, pass from the hands of loyal citizens to public enemies. It is impossible to discern, practically or legally, the slightest difference. Let us suppose a fire insurance for a series of years, in the form now used, with premiums payable annually, upon property located in Richmond or Charleston; five of them are destroyed by accidental fire, and five ignited by the shells of the army. Shall part be paid, and the residue not? A recurrence again to the judgments in reference to maritime insurance will show, that this whole subject is fully discussed and actually decided; and that it is not *dictum*, as it has been so repeatedly said to be. The point was made, that the policy was not necessarily void in all instances, as the subject of insurance might not be captured by the government, but might be destroyed by the accidents of navigation; and that, although it might be impolitic to suffer the enemy to be reimbursed for an injury produced directly by the war, the reason did not apply where it happened from those casualties insured against in time of peace. The reply was, that it was unlawful for a loyal subject to continue to stand guaranty for any loss or damage whatever of a public enemy during war; and that the policies were annulled, no matter what might be the cause of loss.

We esteem it but a perversion of the real reason of this class of judgments, to assert that it reposes solely upon the fact that the insurance was maritime. That instances of other contracts and insurances did not occur in judgment, Sir William Scott, in *The Hoop*, took pains to say, resulted solely from England's insular position; and that the same principle applicable to marine insurances would affect those of property upon land. Is there any distinction which a court of justice has a right to make in this regard, between property which is engaged in maritime commerce and therefore a little more com-

monly destroyed, and that which is located in cities subject to siege, or in the territory of the enemy which, by the usages of war for all times as policy demanded it, is laid waste by armies? In the raids of both parties during our late war, mills and manufactories of all kinds, tanneries, tobacco and cotton, corn and every material which could support a people or an army, were destroyed; and the health of non-combatants thus impaired and their lives endangered. And we say here, as we have just said in reference to another point, that what was lawful in a certain war might be unlawful in another, depending upon the political policy of the government which waged it. Where both governments resorted to confiscation, and each laid waste the territory of the other, it is a mere distinction in words, without any practical difference in actual condition, to say that a maritime policy is annulled and one upon inland property or upon the life of a non-combatant continued.

References to the leading authors and judgments upon this subject will not be made for the purpose of verifying those generalities which are mutually conceded; but, by a reproduction of their argument, to show that the reasons upon which they rest the rule, and the exigencies to which they have applied it, include those now in judgment. This cannot be successfully done without considerable detail, necessarily involving much prolixity. In view of the great prominence which has in modern criticisms been given to the fact that the earlier judgments referred to contracts involving international intercourse, some pains will be taken to show, as we go over the cases, that this is by no means a material feature. This argument derives importance, less from its real nature than from the accident that it seems to be conceded that if all agreements, irrespective of intercourse, are unlawful between belligerents, then these life policies should not be continued by payment of premiums during the war. It is true they have been likened to

mere debts; but the chief reliance is upon the other position.

The most full consideration of the general subject of the illegality of contracts between belligerents to be found in any one adjudication, is the opinion of Kent, Chancellor, in Griswold v. Waddington, 16 John's, 438. Its doctrine that all agreements made during war, and the continued execution of those which are executory made before, are unlawful, which had been repeatedly announced in anterior Federal judgments, is reproduced in his Commentaries, Vol. I., Part I., Sect. III., and cited with approbation by every prominent English and American writer upon international law since its delivery. We think we may successfully challenge the citation of a single criticism upon its accuracy, by either author or judge, until the recent decisions in reference to life insurance. It has been accepted as American common law from the day of its delivery down to the recently attempted revolution. Even upon the supposition that some portions of the elaborate treatise contained in his judgment were *dicta*, its conclusions have so influenced professional and judicial opinion as to constitute it a high authority, irrespective of the facts which produced the judgment. See 2., Brod. and Bing., 598, per Lord Eldon, and 15 East., 225, per Lord Ellenborough. We cannot better subserve the purposes of our argument than to analyze quite fully Griswold v. Waddington, and reproduce, with considerable fullness, its arguments and citations. It was a suit to recover the balance of an account accruing during war, for bills remitted from this country to England. Two of the firm resided in New York, and the other in the latter country. The whole demand was for items received by the foreign house. It was decided: *first*, that war *ipso facto* dissolved the copartnership, because the relation was incompatible with political duty, and therefore, receipts of money by the English members subsequently, did not obligate those in this country; *second*, that funds

transmitted there could not be recovered, because the transmission itself was unlawful. This was the first judgment which declared directly the effect of war upon a copartnership between enemies entered into before hostilities existed. Among the numerous grounds urged to distinguish this case from those to which the principles announced by the Court had been theretofore applied, was, that the partnership did not necessarily extend to *commercial intercourse* between enemies, but might, by presumption, be confined to the *domestic* business and neutral trade of England; and that contracts and business relations were not prohibited, so as actual intercourse between the hostile countries was not involved, and did not in fact result. In answering this argument it became necessary to determine whether it was an essential element that the agreement or commercial relation should involve actual locomotion across hostile lines; or whether the continued execution of the agreement, although entered into before the war, was not unlawful, even though it pertain solely to the domestic trade of Great Britain. We more particularly call attention to these features of this judgment, on account of the recent decision in Kershaw v. Kelley, where many of its doctrines, and those of similar import declared by the Circuit and Supreme Courts of the United States, are denied, and said to be chiefly *dicta*. We do not so read the judgment; but consider it pointedly, deciding that all contracts voluntarily made with an enemy during war are void for illegality; and that all such as involve the continuance of any active business relation, or of continuing responsibility for the acts or losses of an enemy, are dissolved by war. The *reason* why such effect was produced upon the *partnership* was the fact that all *contracts* between enemies being unlawful, they could no more be made through the agency of resident copartners than personally. That absence of necessity for personal intercourse was immaterial. The principle is directly applicable to the abrogation of an agency for the

making, *renewal* or continued execution of contracts; and to all sharing of or guarantying against loss—all of which are involved in the partnership relation. Chancellor Kent, at p. 451, cites Grotius, Lib. III., Ch. 22, as saying: "*Private contracts* with the enemy, touching private actions and things, are unlawful." Gronovious, one of Grotius' commentators, he says, repeats and illustrates the principle. Puffendorf, Lib. VIII., Ch. 7, § 14, is said by his illustrations clearly to exclude *all* contracts, save those made by prisoners and residents in the enemy's country for necessaries and self-protection; and that Barbeyrac, in a note to the passage, declares that private agreements between enemies are forbidden by law. Vattel, b. 3., c. 16, § 264, confines the right of making private contracts in the same way. This is declared to be all the "indulgence allowed to private contracts during "war;" and it is further said that no *private negotiation* by way of business is tolerated. P. 453, Heineccius, is referred to as saying "that it cannot be permitted that "one should *enter into negotiations* with those with whom "we are at war." Le Guidon, a French treatise, chapter 2, § 5, is quoted as saying that no subject of the king can put his hand to an *insurance* of property *belonging to an enemy*. It does *not* say property in transit to or from an enemy's country. It is then shown that the French rule is in conformity with the ordinances of Barcelona of 1484. Cleirac, p. 197, is then referred to as repeating the rule in reference to insurance, and as adding that enemies cannot *negotiate* with each other. Valin and Emerigon are declared to be full to the same purpose. At p. 455, he sums up what thus far had been shown; and among other results he supposes that "*no private ne-*"*gotiation or contract whatever is admissible*, save in case of "*self-defence.*" The earlier history of the English common law, and the judicial announcements in that country of the maritime law, are then minutely traced. The judgments reviewed are in reference to trade between

the belligerent countries; but the reasons and declarations of opinion quoted amply sustain his deduction that *contracts* are *per se* void between enemies. The leading Federal cases are fully considered in the judgment. At p. 483 he says: "There is no authority in law, national, "maritime or *municipal*, for any kind of private, volun- "tary, unlicensed communication, business or intercourse "with an enemy. It is all noxious, and in greater or "less degree criminal. Every attempt at drawing dis- "tinctions has failed. All intercourse but that which is "hostile, or created by the exigencies of the war, is ille- "gal." Thus far, it is true, he was dealing with the proposition that the contract was void because predicated upon an illegal trading between the countries; but he was also preparing the elements for the support of his second and equally necessary proposition, that the contract was dissolved because no *contract* could be executed which involved continuing performance, and no *business relations* could exist, whether *intercourse* was involved or not. At p. 488 it is said, war dissolves a copartnership for the *reason* that "an enemy" [partner] "cannot in "that capacity make a *contract* binding upon the other "[partner]. This would seem to be the inevitable re- "sult of the new relations created by the war." Such a reason is literally applicable to the abrogation of the agent's power in this case; and also terminates the liberty of election by the insured to continue a guaranty in his favor, the moment he becomes a public enemy.

3 B. & P., 191, Furtado v. Rogers; 8 T. R., 548, Bell v. Potts; 4 East, Keller v. Lemesurier; ibid. 409, Gamba v. Lemesurier; 4 East, Brandon v. Carling; 1 Wm. Robertson, 196, *The Hoop;* 7 E. & Black, Q. B. 763, Esposito v. Bowden; Avery v. Swan, 6 E. & Black. 953, and the other English cases growing out of the Russian war, are all, as has been said in the judgments which refuse to follow the substantial *principle* they lay down, cases where the property insured was subject to maritime

capture, and where the contracts sued upon involved intercourse with the enemy. From this fact it is argued that their principle abrogates such insurances only, and that those upon inland property and business are not affected. But Chancellor Kent, and all the other elementary writers and the Federal Courts, deduce from them the broader doctrine which we announce, and which we have already endeavored to consider upon principle. The unusual length of our judgment compels us to omit our analysis of these cases. It is conceded that their language, their argument and illustrations literally sustain a rule which would compel judgment against the plaintiff here. It is argued only that the facts in the several judgments did not call for the announcement of so broad a doctrine. If the rule of interpretation is to be applied, which deduces the extent of a doctrine from its reason and the motives which call for its institution, and which applies it in all circumstances where the very evils are to be prevented against which it was intended to guard, then this list of judgments has not been misinterpreted for half a century, and the novel contrary reading is unjustifiable. And should we accept that other rule of interpretation, which confines the operation of a declared principle to the precise facts, and limits its extent to the actual necessities, of the case calling for its announcement; and should it be conceded that, tested by this rule, the announcements in question are *dicta*, still we should, in view of their history, consider them entitled to great weight from their having been so long recognized as law. But there is no necessity of resorting to any reverence for oft-repeated *dicta* here. In no sense is the generality *obiter*, which declares it unlawful to continue insurance upon the property of an enemy. In Furtado v. Rogers there was no international communion, because the voyage insured was from one French port to another; and the judgment necessarily rests solely upon the impolicy of insuring enemy's property. But even in the cases where

international intercourse was involved, and where the property was subject to confiscation, three objections, distinct it is true, but all equally arising upon the records, were presented: *First:* That the commerce was international, and unlawful intercommunion would result. *Second:* That the property was subject to capture, and so it was unlawful to insure it. And *Third:* Which is more particularly applicable here, that the contract was one of continuing performance, where a loyal subject stood continuously bound to guaranty a public enemy against loss. The last was just as appropriately discussed and decided as the first. With precisely the same propriety it may be argued that all which is said about intercourse and confiscation is mere *dicta*, because unnecessary in a case which might have been disposed of on the ground of continuing performance and guaranty against loss. It is not true in fact, that all these judgments are rested upon the features of national intercourse, or upon the fact that the property is subject to confiscation. The other objection, that it was unlawful to stand responsible for the losses of a public enemy, however they might happen, was distinctly asserted. The cases, therefore, which so emphatically lay down the doctrine we apply, and which have so long stood for law, must be overruled, or judgment in this case must be given against the plaintiff. In 13 Vesey, 71, *Ex Parte Boussmaker*, Lord Chancellor Erskine, in deciding that an alien enemy might prove his debt in bankruptcy, and in reply to an argument at the bar said: If the *contract* had been made with an enemy during war it could not stand a moment—it would be *void*. The circumstances involved no intercourse between the hostile countries. A *contract* between enemies is declared to be illegal. In Brown v. The United States, 8 Cranch, 110, timber was seized by the government as being maritime property of an enemy, and condemned at the Circuit. But as it had been unladen from

the ship, it was deemed by the Supreme Court upon *land;* and upon this point the decree was reversed. Justice Story had condemned the property at the Circuit, and it there became necessary to pronounce upon the legality of the purchase by the claimant, who, after the commencement of the war, had bought the timber from an *agent* of the enemy in this country. There was no communication whatever with England, in order to consummate this contract. In reference to this sale, he said: "Brown claims, by virtue of a *contract between* ene-"mies during the war. It is of no importance what the "character of the agent is. No principle is better settled "than that *all contracts* with an enemy made during war "are utterly void." This utterance necessary for the case in the Circuit was not touched by the judgment in the Supreme Court. It is a decision by a Judge, who, if we may except Chancellor Kent, had more thoroughly studied this department of the law than any other American jurist. He decides that a purely domestic contract with an alien enemy, through a loyal citizen agent who had received all his powers and instructions before the war, is void; because it creates an obligation which is capital and present increase of the enemy's available means. This was not a *dictum.* The learned Judge could not have rendered his decree without so ruling. And we repeat, that the reversal of this decree upon other grounds by a Court which has itself so repeatedly announced the same rule, in no way shakes this precedent as an authority for a tribunal circumstanced like this one. The point decided in *The Julia*, 8 Cranch, 181, was, that sailing under an English license, even to a neutral port, was unlawful. But in the opinion in the Circuit, which was approved and appears as that of the Court above, in answer to the argument that the purchase of the license in a home port was lawful, because goods might be bought of *enemies' manufacture* in a *neutral port*, it is said that such a purchase from an enemy would be

illegal. That it is "unlawful, in any manner to lend as-"sistance to the enemy by attaching ourselves to his "policy, *facilitating* his *supplies* or separating ourselves "from the character of our country." The idea that intercourse is necessary to invalidate is excluded. In 8 Cranch, 155, *The Rapid*, it became necessary to assert the principle upon which the unlawfulness of intercourse with the enemy rested, as there was no purchase or contract, but simply the removal of property owned before the war by the claimant. The Court lay down the rule so often asserted by it since, that "Every individual of "one nation must acknowledge every individual of the "other as his enemy, because the enemy of his country." "They who compose the belligerent states exist, as to "each other, in a state of utter occlusion." It is unnecessary to quote authorities: they are numerous, explicit, respectable and have been ably commented upon in argument. In this case the Circuit Judge, Story, 1 Gall., 304, said: "It is difficult to sustain the opinion, that "trade can subsist in a state of *utter hostility;* or that "*contracts* and credits can be valid when they are subject "to confiscation."

The Federal judgments since have in no way limited these principles. Schofield v. Eichelberger, 7 Peters, 586, was a suit for goods bought by the plaintiff from the defendants in England during the war, but not received until peace. The correspondence containing the orders went over in a cartel ship, and was inspected by government officers. The idea of unlawful intelligence was excluded. The Court say "the doctrine at this day "is not to be doubted, that during hostilities the citizens "of the hostile states are incapable of *contracting* with "each other." In suggesting possible limitations to the rule, even in instances where the contracting party is already lawfully *within* the hostile territory, and where there is no intercourse between the countries, the Court mentions those for necessaries and for money to return

home. All others are said to be illegal. They are far from including leases of real estate, its actual cultivation and the production within the enemy's country of its chief and most valuable staple, such as Kershaw v. Kelley declared to be lawful. As little do they include the continuance of a guaranty to an enemy creditor against the loss of his demand if his debtor die, such as 20 Grattan sustains. In 5 Wallace, 377, *The William Bagley*, the Court, with some severity, applied the old doctrine, that the share of a subject or neutral in property of a firm doing business in the enemy's country, was subject to capture; and this, too, where the business was commenced before the war, and the loyal claimant had left the South for a residence in New York. There was no intercommunion; but the *produce* of business in an enemy's country is, *pro hac vice*, enemy's property. All the adjudications and elementary writers which lay down and illustrate this familiar rule, show that it rests upon the fact that such business and all manufactures and productions of the enemy's soil, increase his strength and prolong his power of resistance. Between the practical consequences of those acts and relations which these rules declare to be illegal, and those which are begotten by this scheme of mutual insurance, there is not one scintilla of difference. In 7 Wall. 542, Coppell v. Hall, there was a fraudulent use of an English consul's "protection;" and the military permit to cross the lines was held to be unauthorized; but in declaring the purchase of cotton illegal, from a belligerent, by one domiciled at New Orleans, then in Federal possession, the Court repeat, in their utmost extension, the principles upon which we rely. Justice Swayne cites and approbates what we elsewhere quote from Wheaton and Kent, and 1 Robinson, *The Hoop;* and at p. 556 says, "The objection rests upon the same *principle* as *insuring enemy's property*," and refers to Emerigon, Bynkershoeck, Valin, and Phillmore, and various common law authorities, to

show that this is everywhere held to be *illegal*.—Illegal not only because it aids *maritime* commerce, but because, as he forcibly illustrates, it adds to the resources of the enemy. After quoting at length from Chancellor Kent, in Griswold v. Waddington, he cites and approbates what Story, Justice, says in Brown v. United States, as follows: "No principle of law is better settled, than that *all con-* "*tracts* made with an enemy during war are utterly void." And see 8 Wall. 185, U. S. v. Lane; 8 Wall, 163, McKee v. U. S. This latter case, although not necessarily depending upon such a ground alone, we think is made to rest upon the illegality of a *purchase* by one lawfully within the rebel lines, and where there had been no removal of the cotton out of the territory where bought. In 9 Wallace, 72, U. S. v. Grossmayer, a debtor, being within the rebel lines, at the request of a creditor in New York, bought cotton and deposited it in payment of the debt, with an agent selected during the war. It was not transferred North, nor intended to be. No money was sent South, and no new consideration paid; but simply an old debt was discharged. It was held that no title vested in the creditor, because the negotiation for the agency was in violation of public duty. In this case we grant that the only element of illegality consisted in the negotiation for the agency. In the act of payment from an enemy to a loyal citizen, through a local agent, without intercommunion of any kind, there is no public injury, actual or presumed. But whenever new arrangements are to be made, elections to be manifested and notified, or any new relations assumed to create which a new meeting of minds is necessary, or an additional act performed, the transaction would be illegal within the judgment in the Grossmayer case. 1 Duer on Ins., 415, says, it will subsequently discuss the "important question whether "the *contract* is not illegal and void in some cases where "the property insured is *not liable to confiscation*." After stating the reason why marine insurances are illegal to

be that "the whole body of insurers become in their "hearts the enemies of their own government;" and "that "they are under a constant temptation to save themselves "from ruin;" on p. 418 he adds, it is an ancient doctrine of the common law "that all contracts made with an enemy "during war, with a few necessary exceptions, not includ- "ing *insurance*, are illegal and void." Justice Story, in *The Emulous*, 1 Gall., 591, is referred to. In the note the only exceptions are stated to be. bills by prisoners of war and similar contracts. At p. 473, note II., the English cases are considered and the rule deduced, that an *insurance* upon enemy's property becomes void by war, whether the loss is by capture or otherwise; and that war occurring *subsequently* to the policy, abrogates it. He concludes the note by saying that contracts are suspended, only when they give an absolute vested right, irrespective of any further act or volition of the parties, such as notes and bonds; but that an executory agreement, when any additional performance is necessary in order to keep alive the obligation or perfect the right, so far as future performance is concerned, are discharged. His whole treatment of the subject clearly includes a case of life insurance terminating the agency and abrogating the policy. See p. 463, note II. P. 582, says that the *reason* for the familiar rule that property, suffered to go into an enemy's port on its way to a neutral or home port, is subject to subsequent capture, is "because the "property became liable to seizure by the enemy when "in its port; and the subject violated his duty to his "own government by *subjecting* it to that hazard." This reason is literally applicable to the *creation* of credits subject to confiscation by the rebel power. Story on Part., § 315, says, public enemies "can make no valid "contracts with each other and hold no communication "of an amicable nature." And see Story on Agency, §§ 461 and 462, 481, 482 and 499. Bunyan on Life Insurance, 19 Law Library, 28 or 63 Law Lib. N. S., 308,

says: "The life of an alien enemy cannot, however, "be insured by his creditor, although the latter be "a British subject." We might not push the principle upon which we rely quite so far as this learned author. We should be inclined to uphold an insurrance by a loyal person, upon the life of an enemy debtor, in a home company. No additional interest in saving the life of the enemy debtor would be created by such a policy; its only effect would be to transfer that interest from the creditor to the insurer. 1 Phil. on Ins., 126 §§ 223-224, Arnold, Parsons, and every other elementary writer, by their analyses of judgments and their modes of announcement, assume as settled law, that all *contracts*, save for necessaries and ransoms, are illegal between enemies; and that all the cases of marine insurance are but instances of the application of this principle. That there is anything in their nature distinguishing them from transactions on land, or contracts made within a hostile country, the effects of which are to increase the resources of the hostile government, is nowhere hinted at. This idea is found solely in the few modern judgments which have upheld contracts for raising cotton in the enemy's country and the continuance of life policies.

That a contract, the performance of which becomes illegal by matter subsequent is discharged, and that this familiar rule is applicable to policies of insurance, see Woods v. Wilder, 43 N. Y., 167; 3 B. & P., 191, Furtado v. Rodgers; 1 Salk, 198, Brewster v. Kitchell; Lathers v. Com. Ins. Co., 2 Bush., 298, 2 Pars. on Cont., 674; 5 Cow., 538, Presbyterian Church v. N. Y.; 15 Geo., 213, Bennett v. Woolfolk; 1 Pars. Admlty. and Shipping, 329; 3 Wash., C. C., 276, Gray v. Simms; 2d ibid. 321—312, Odlin v. Insurance Co., of Penn.; 6 Wall, 532, Hanger v. Abbott; 90 Eng., C. Law, 762, S. C.; 7 Ellis & Black; Q. B., 763, Esposito v. Bowden, and the English cases there cited.

Modern authority is not wanting for the judgment we render. Several well-reasoned judgments and opinions of learned Judges sustain our views. In Sands v. The New York Life Ins. Co., in a painstaking opinion, and after full review of the English and American judgments and elementary writers, showing that no source of opinion was overlooked, Judge Robinson, as Referee, holds that a life policy was abrogated by the war; that the continuance of the agency was unlawful, and the payment of the premium a condition precedent, the non-performance of which defeated an action. He shows what a reading of the case would readily suggest, that all which Justice Platt says, in Buchannan v. Curry, 19 John's, in reference to the completion of executory contracts, and which has been so frequently quoted, is wholly *obiter*.

In Cohen v. New York Life Insurance Co., the Superior Court of New York make a similar ruling, and deny relief in equity. This is the same cause decided differently by the Court of Appeals. Bliss on Life Insurance, at p. 644, cites the decision of the Superior Court of Baltimore, in Mitchell v. Mut. Life Ins. Co., of N. Y., deciding that the policy was abrogated by the war. In this latter case the question is asked, if it could be contended for a moment that the policy would be good upon the life of an Englishman if it provided expressly for its continuance in case of war with his country. Such a policy, it is assumed, would be void. In the Superior Court of Baltimore, Stephens v. New York Life Insurance Co., Judge Dobbin holds that the policy is annulled by hostilities, and says: "Where the contract is executory in its char-"acter, and is such as renders commercial intercourse "between the respective belligerents necessary in order "to perform its conditions," and "where the contract is "such as to operate as an indemnity to the party insured "against loss or damage occasioned by the other belig-"erent, there the contract is not merely suspended, but

"dissolved." Although books are not cited, the learned Judge takes pains to say that the question had been several times most thoroughly argued before him, and that he had maturely considered it.

Among the leading and forceful judicial arguments in favor of abrogating these policies, is the dissenting opinion of Judge Christian, in Warwick v. Manhattan Life Insurance Co., 20, Grattan, 614, in which a policy upon the life of a rebel debtor, taken by a rebel creditor to secure his debt, was held not to be abrogated by three judges against two. The 44 Georgia, p. 119, Dillard v. Manhattan, is a decision precisely in point upon a life policy. In a well-reasoned opinion, going over most of the applicable authorities, judgment was given against the plaintiff.

With this long line of adjudications establishing the doctrine that such a continuing contract, and such relations as this mutual scheme creates, are abrogated by war, and after the correctness of such doctrine has been asserted by every elementary writer who has spoken upon the subject, and so often announced by the Court of last resort which is to review our judgment, we have no doubt about our duty in rendering judgment against the plaintiff. We should have none, even though we perceived more reason and justice in the adjudications which oppose our own. But after the most painstaking examination of them, and after having given the cause far more consideration than our time permits to most cases, we are with much respect constrained to say, that neither their conclusions nor the grounds upon which they rest commend themselves to our judgment. Irrespective, therefore, of the points hereafter considered, we should deny a recovery in this case, upon the sole ground that the contract became unlawful, and was discharged the moment the parties became public enemies.

We have not had access to the discussions of this subject in the Court of Claims, but, judging from references to its decisions, we should infer that its opinions accord

with our own. See Blakeley's case, 2 Nott & Hunt, 323; Gearing's case, 3 ibid. 165; Stoddart's case, 4 ibid. 511; Dillon's case, 5 ibid. 587; Grossmayer's; 7 ibid. 129; Padelford's case, ibid. 144.

It is a distinct ground of defence in this case, that the payment of the premium *on the day* is a condition precedent, and that, irrespective of the illegality of continuing the indemnity after hostilities, the policy became void by the non-performance of this condition. Reference will be made to the cases which announce the old and unquestioned rule—that a condition precedent must be performed, in order to furnish grounds for recovery under the contract—only to show that the circumstances relied upon to take this case out of it, attend its most ordinary administration. Impossibility of performance, growing out of unanticipated exigencies, constitute no exception to its operation. Bliss, on Life Insurance, pp. 253-274, fairly states the leading American and English cases, stringently applying the doctrine that payment is a condition precedent. He cites Roberts v. N. E. Mut. Insurance Co., 1 Disney, 385; Bergson v. Builders' Insurance Co., 38 Cal., 541; Norton v. Insurance Co., 36 Connct.; Sheridan v. Phœnix Co., 8 House of Lords cases, 745. This last case, and 1 Disney, 355, S. C., 2 ibid., 106, refer to the fact that it is optional with the insured whether he will continue the policy, as an additional and conclusive reason why it must be terminated by his failure to pay on the day. In 2 C. B. N. S., 257, Simpson v. The Accidental Death Insurance Co., Creswell, J., interrupting counsel, says: "If the insured really means to *drop* the insurance, but "meets with an accident within the twenty days, he may, "according to your argument, tender the premiums *which* "*he never* intended to pay, and make the Company liable." Such an interrogatory is still more applicable to the condition of things here. For those who have *died*, representatives claim compensation; while hundreds of those who *survive* refuse to continue because they can do better by a

new insurance. This company would, beyond all doubt, be quite willing to pay for all who are dead, if all those who survive would pay up back premiums, thus carrying out the scheme according to its intention and financial theory, and affording a fund to pay the losses. In 4 Vroom. N. J., 487, Catoir v. The American Life Insurance Co., the Court approbates the provision avoiding the policy for non-payment, and the rules of law applicable to it, as eminently just and necessary for the safety of the company and of the public which relies upon its solvency and punctuality. In 12 East., 183., Want v. Blunt, the insured died within the fifteen days allowed for making the payment. It was a case of great hardship, and was elaborately argued. The form of the policy was substantially like that before the Court. Upon full consideration of the doctrine in reference to conditions, it was held that, substantially, the insurance was from quarter to quarter, where the premiums were so paid; that so far as the insured was concerned, it was a new contract each time he elected to pay and continue the insurance. Lord Ellenborough said it was one of insurance, and must be read in view of what the parties undoubtedly intended by the words they had used. This intention, deduced from increased fullness in the stipulations and long practice under them, is still more undoubted now. The subtle and irrational distinction suggested in a note to Cohen v. Insurance Co., 50 N. Y., between the latter case and another in the forty-fourth volume of the same series, was strongly urged upon the Court in Want v. Blunt, but was disregarded. In Gamble v. Insurance Co., 4 Irish Rep. Com. Law, 204, and Howell v. Knickerbocker Co., 3 Rob., 232, S. C., 44, N.Y., sudden death in one case and paralysis in the other prevented performance on the day, but the rule was applied. Upon this ground Dillard v. Manhattan Co., 44 Georgia, 119, is a case in point for the defendants. Premiums there were not paid on account of the war. It was said that where the contract made no exceptions, the

Court could not treat the occurring of the war of the rebellion as such. The judgment is well reasoned and amply verified by citations. We see no reason why this familiar principle does not entitle the defendants to judgment, although the war alone prevented payment in time. Some additional reasons relied upon to take this case out of the operation of this rule are elsewhere considered in connection with the jndgments where they occur.

Some of the judgments relied on by the plaintiff decide that, if the war rendered the payment of the premiums impossible, such fact constitutes an *excuse ;* and that a subsequent tender authorizes a recovery. There are but few cases where subsequent impossibility is an excuse, even where it is relied upon only as a defence. And there is a broad difference, both at law and in equity, between protecting a defendant from an action for damages, and authorizing him to recover against another, where, in like circumstances, he has failed to perform a condition precedent on which his right of action depended. And still wider is the distinction, where the condition is *optional*, the agreement, so far as this feature is concerned, unilateral, and the damages dependent upon some act to be performed at the election of the plaintiff. Before 20 Grattan and 9 Blatchford, we know of no judgment or elementary book which suggested there could be recovery in such case. 2 Pars. on contracts, 672, says, no degree of mere *hardship* will satisfy the rule that the act of God rendering performance impossible is a defence. And in no case is impossibility an excuse, if it refer solely to the personal disability of the promisor, there being no natural impossibility in the thing. See ibid., 459. The cases which establish and apply this rule show most clearly, that far greater effort is demanded from the promisor, than that of requiring the insured to leave the rebel region and come within the loyal lines, if he wishes to continue the indemnity ; and quite

as clearly that it is no answer to say that, in the accidents of his personal circumstances, he was unable to do so. The following American judgments are fully sustained by the English cases they cite and approve. Thompson v. Dudley, 25 N. Y. (11 Smith), 272, was an action to recover back money paid towards the construction of a school-house, which the defendants had covenanted should be built by a day named, but which, just before its completion, was destroyed by fire. The Court say, that a contract positively to do an act is not discharged by *inevitable accident;* and the greatest *hardship* will not prevent the application of the rule. The 25 Conn., 530, School District v. Dauchy, in which the building was destroyed by lightning, is approved. In this latter case, Elsworth, J., says: "In the contract no provision was "made for any contingency, and defendant can incor- "porate none into it, but must abide by his absolute un- "dertaking." This case quite fully cites the leading English and American judgments. In 3 Dutcher (N. J.), 514, Trustees v. Bennett, where under a similar undertaking, the building fell down, owing to a latent defect in the soil, instalments paid were recovered back upon the like ground. It is said "that he who by contract creates "a duty upon himself, must perform it, notwithstanding "any *accident by inevitable necessity;* because he might "have provided against it in the agreement." The New Jersey Court adds, that "however appar- "ently harsh the rule may be occasionally, it "has its foundation in good sense and inflexible honesty." And see 19 Pick., 275, Adams v. Nichols. In Dermot v. Jones, 2 Wall., 1, Bullock v. Dommit, 6 T. R., 650; Brecknock Co. v. Pritchard, ibid. 750; Trustees v. Bennett, 3 Dutch., 513; Beebe v. Johnson, 19 Wendell, 500; Beal v. Thompson, 3 B. & P., 420; all extreme applications of the rule, are cited and approved; and the following remarks made by Justice Swayne: "The principle which controlled these cases rests upon

"a solid foundation of reason and justice. It regards "the sanctity of contracts. It requires parties to do "what they have agreed to do. If unexpected impedi- "ments lie in the way and a loss must ensue, it leaves "the loss where the contract places it. If the parties "have made no provision for dispensation, the rule "of law can give none." He says that in *such* cases *equity will not interfere.* The fact that in this case recovery was had upon the common counts when the defendant had received and occupied the house, in no way qualifies the principles we have quoted from the judgment. And see Chitty on Cont., 734; 8 T. R., 259; Ang. on Carriers, 294; 3 Burrows, 1637; 4 Wheat., 204; Co. Lit., 206 b.; Shep. Touch., 164; 12 N. Y., 99, Harmony v. Bringham; 11 N. Y., 25, Oakley v. Minturn. The case before us is one at law, and even if, in an extreme case, equity would relieve, there can be no pretence that in this action an excuse can be accepted by the Court in place of performance. The contract in this case, in the most unambiguous terms, declares the premiums must be paid on the day or the policy is void. There is no exception of difficulties or impossibilities. The agreement is absolute in terms; and the nature of the scheme and the presumed intentions of the parties leave no room for the slightest doubt that they mutually *intended* its literal enforcement. It bears no possible analogy to the cases of forfeitures and penalties intended to secure acts and payments, where time is not of the essence of the contract; which, in our estimation, are so inapplicably quoted in several of the judgments from which we dissent.

Before the recent decisions cited by the plaintiff, we find no case or author suggesting that a complainant in a court of equity is entitled to relief where he has failed to comply with conditions precedent, which he was under no obligation to perform, and the contract was, in that regard, wholly unilateral. Much less have we been

able to discover a single instance of interference where the agreement is in common use, and punctuality is well understood to be of its essence. The distinction between enforcing a right dependent upon conditions, and protection from penalties intended to secure collateral payment, we do not know to have been disregarded in any other judgments. The learning upon this subject is as familiar as any in the law, and will be considered only to insist upon its misapplication in the opposing judgments. There are many exceptions to the rule that equity will relieve even from penalties and forfeitures; and the grounds upon which they rest are applicable for greater reasons to exclude interference here. Story's Eq. Jur. contains a full and accurate discussion of most of the older judgments upon the subject. After stating generally, in §§ 1302 to 1307, that *at law* he who enters into a contract, which by any possibility can be performed by *any* one, although impossible for the party himself, is bound by his agreement; and after citing the conflict of authority as to whether a party is discharged at law where by act of God performance subsequently becomes impossible, he announces a rule in equity which in no case interferes with the intention of the parties. It is said in § 1316, a penalty is relieved from only when intended to *secure* a payment; and all the cases cited demonstrate, that it is where there is an absolute *obligation* to pay money and the penalty was to enforce it. The idea of relief is completely excluded where, as in this case, an affirmative right is claimed and no obligation existed to perform the conditions upon which alone the contract accorded such right. That the *intention* always governs, is further discussed in § 1318, in reference to liquidated damages. An application of this principle, peculiarly germain to the facts in this record, is illustrated in § 1325, where it is said, that considerations of public policy and of what is necessary to carry out corporate objects, frequently render punctual payment

necessary. In such cases, it is said, relief is never granted from forfeitures of subscriptions and stocks. A perusal of the judgments which sustain this rule amply justifies its policy, and suggests what is true, that no class of corporations or general process of business more eminently calls for the administration of this doctrine, than those now before the Court. And see §§ 287, 288, and the discussions generally of the doctrine of conditions by this learned author. In 1 Disney, 355, Robert v. New Eng. Life Co., an action was brought, asking relief from what was erroneously called a *forfeiture* for non-payment of premiums on the day, and a decree asked for the sum insured. In one of the ablest judgments to be found on this subject, by a judge who has had few superiors in the American judiciary, Gohlson, J., for the Court refused the relief. He says, if the contract for absolute punctuality violates no principle, the parties may insert what terms they please, and the law demands a strict compliance. Easton v. Canal Co.; 13 Ohio, 79; Eagan v. Mutual Ins. Co. of Albany, 5 Denio, 326; Beadle v. Chenango County Ins. Co., 3 Hill, 161; Jennings v. ibid, 2 Denio, 75, are cited, in all which the literal terms of the agreements, *such being the presumed intention of the parties* as deduced from the nature of the contract, were rigidly enforced. That there can in such a case be no relief in equity, because the real *intention* was to indemnify, *only* while the premiums were paid, and relief would therefore involve the creation of a new agreement by the Court, is forcibly shown. It is said that from the very *nature of the contract*, the *punctual payment* is of its substance. He cites and approbates the fully applicable case of Davis v. Thomas, 1 Russ. & Myl., 506, affirmed on appeal, where a purchase was lost by neglect to pay rent on the day, and relief refused, because it was optional, and one party only bound. The agreements in these insurance cases were said to be alike *unilateral*, the company having

no power to force its continuance; and this feature alone was *conclusive* against relief. The true nature of the agreement, which we think is wholly overlooked in the recent judgments, is stated, and attention called to the fact that for a few hundred dollars the company was called on *to pay* $8,000. This would be *just*, if demanded in the conditions upon which alone it was *agreed to be paid*. But we submit that it would be alike unjust and demoralizing to the law, to decree its payment by making in effect a new agreement for the parties. The risk which is run by the company is a *full*, meritorious, and solid consideration for the premiums already received. Some of these judgments speak as if, financially, this element of consideration was not known to the law; or if so, only as a technicality without substantial value. None stand higher, or receive fuller protection, both at law and in equity. The latter courts are full of illustrations of withholding relief where parties have had the *benefit of chances*. In 2 Ed., V. C., Rep. 78., Wells v. Smith, a contract to convey provided that it should be void unless the complainant made certain payments, and mortgages, and other details, by a day named. It was held, upon the distinction between the authority of a court to grant relief from a forfeiture and that to vest an estate *originally* where a condition was unperformed, that no relief could be given. The cases are fully cited and reviewed. The decree is affirmed, 7 Paige 22. The 4 Comstock, 360, Pike v. Butler, dismissed a bill asking relief from the consequences of failure to erect a building in precise conformity with a contract, where the loss was total without it. Gardiner, J., says: "It is the enforcement of a legal right operating oppressively in "the particular case, but against which it is difficult for "law or equity to afford relief, without substituting the "undefined, and therefore dangerous, discretion of a "court for the fixed principles upon which the law in relation to contracts should be administered." And see

also 9 Paige 211, Crippin v. Hermance; 1 Johns., Ch. 370, Benedict v. Lynch; 1 Sim. & Stu., 598, note 2; 1 Hoff, Ch. 139, Wiswall v. McGowan; 4 Paige 355, Gates v. Green; 18 Ves., 116, Hozephel v. Baker.

Time is always deemed of the essence of the contract, where its subject varies in value, or the motives and interest of complainant are subject to change. 1 Sim. & Stu., 590, Dolorout v. Rothschild; 1 Young & Coll, 94 Stubbs v. Sylvester. The cases on this subject are numerous and varied. The health of the insured, his changed circumstances after a few years' delay in non-payment, oftener than otherwise, produce an abandonment. This contingency is several times noticed in the judicial discussion of these policies, and most materially affects its interpretation, and the standing in a court of equity of those who seek a recovery where premiums have not been paid. It is but common justice that it should do so. See in reference to this subject generally the following cases: Mut. Benefit Life Ins. Co. v. Ruse, 1 Bigelow's R. 83; Howell v. Knickerbocker Life Ins. Co., 3 Rob., 232; Robert v. New England Mut. Life Ins. Co., 1 Bigelow's R. 634; Catoir v. Am. Life & Trust Co., *supra.*; O'Reilly v. Mut. Life Ins. Co. of N. Y., Superior Ct., Nov. 22, 1868; Koelgis v. The Guardian Life Ins. Co., 2 Lansing, 480.

If this contract were an isolated transaction between individuals, a court of equity would refuse to enforce it against the obligor as unconscientious. See Story's Eq., Jur., § 331, etc., and Fry on Specific Performance, § 203, *et seq.* The judgments on this subject abundantly demonstrate, that equity would afford no relief in the enforcement of such an agreement, where the complainant for a few hundred dollars asked as many thousands. The contract becomes just and moral, only when it becomes a part of a great system, and rests upon the averages of many thousands of lives. The only rational mode of contemplating the transaction is to consider all those who live in the loyal States as an aggregate insuring all

those in the disloyal, and to administer such a rule as would do justice generally between the two classes. The 50 N. Y., 9 Blatchford and their associate judgments decide, that the body of members who punctually pay shall remain liable to such portion of those who do not pay, as happen to die within the period of suspended payments; while they have not a farthing of claim on that great mass of other delinquents, who outlive this period, and refuse to pay their premiums after the war. The financial consequence is identical with that which would result from a deliberate selection and insurance by the officers of the company, of a given number of lives which they knew would terminate within five years, and a rejection of a still larger number which it was known would pay premiums for an indefinitely longer period. As is said by the learned Justice Hunt in his dissenting opinion in Howell v. Knickerbocker Co., 44 N. Y., 286, in arguing an analogous question, the usage would amount to "a practice of receiving small premiums for "the issuing of large policies of insurance upon the lives "of persons *already dead*. To bring it to the case of Mr. "Howell, who, according to this construction, was only "one *of a numerous class*, the case was this: This company "agree with Mr. Howell that if he should die on the 15th "of July of any year, after twelve o'clock at noon on that "day, or within a few days thereafter, if any one on his "behalf should then pay to the company the sum of $138 "they would at once issue or renew a policy upon his "life for one year for the sum of $5,000. They would "in short agree positively to pay $5,000 for the consid-"eration of $138. * * It is, as already stated, an "agreement to insure the life of a man who is dead at "the time of making the agreement." The entire scheme depends upon the assumption of what is known to be true, that a small number only would die within a short period, while the far greater portion will live and pay premiums to a com-

paratively advanced age. These modern judgments cut the scheme in two, and say to all those who are public enemies, "none of you need pay your premiums as pro-"vided in the contract; but those who happen to die "are entitled to the full sum insured, deducting the "premiums, while not one of your fellow-enemies are "compelled to contribute a dollar for this purpose. The "money shall be paid by loyal citizens alone." The disastrous effects of such a rule of law upon a mutual insurance company, and the vital importance to them of the prompt payment of premiums by all for whom they stand guaranty, will appear by a simple illustration. It is well known that the whole scheme of life insurance is based upon the law of average. Out of a given number of insured persons, statistics show there will be on the average, a certain proportionate number of deaths each year; and in a mutual scheme the premiums to be paid each year by the whole number insured, are fixed at such an amount as will make their sum total just sufficient to meet the losses arising from the average deaths during the year, and to provide for unforeseen fluctuations of the law of average and other contingencies, including necessary expenses. Thus in a company consisting of one thousand persons insured for one year for $1,000 each, where the average number of deaths were fixed at ten, each member must pay a premium of $10, making in all $10,000 of premiums, in order to meet the ten death claims—supposing for the sake of simplicity that there are no expenses or fluctuations of average. The company would thus meet its liabilities and be solvent at the end of the year. Now, suppose it start the next year with the same number insured in like manner and on the same basis; but that five hundred of those who paid premiums in the former year suspend payment in this. Out of the five hundred who pay, the average number of deaths will be five, and the amount of premiums paid will be just sufficient to meet those losses

$5,000. But five also of those who suspend will die; and under the rule in question the company would be liable to their representatives for $5,000 of death claims less $53.50 of unpaid premiums and interest, with no means for meeting such a liability, and no claim whatever upon the survivors of those who suspend. If time were thus held not to be of the essence of these unilateral life insurance contracts, it is difficult to see how a mutual company can escape ultimate if not speedy bankruptcy. No one knowing such to be the law would pay a single premium after the first; but would suspend; and if he chanced to die within the time when the amount assured to him would exceed that of his unpaid premiums, his representatives would demand that excess; otherwise he would drop the policy; thus securing to himself all the benefit of his chances of death, while the company have no benefit of his chances of life after the first year. There is but little significance in a name; but our own idea of the result of such a rule of law is expressed by calling it rank injustice rather than the beneficent and kindly interference of a court of equity to prevent wrong. We have no doubt that, were this a bill in equity seeking relief from the consequences of the impediments created by the war, as possibly it may be claimed to be, no relief could be given. For a greater reason must judgment be denied in this action at law.

So many of the arguments upon which the following counter-judgments rest have been already considered, that few of their points will be here noticed, and those by no means the most important. Kershaw v. Kelley, 100 Mass. adds the considerable influence of the tribunal which decided it to the recent tendencies; but we do not perceive that its argument adds anything to the reasons which sustain them. We know of no more forceful illustration of the impolicy of the rule asserted in that judgment, than the simple statement of the unpatriotic and mercenary conduct it legalized. Indeed,

we think we discover in the unparalleled meanness of the defence, that which greatly prejudiced the mind of the court in reference to its legality. A resident of Massachusetts, while his fellow-citizens were hurrying to the battle-field, betakes his capital, his son and himself to the enemy's territory, and renting a portion of it, enters into a contract for raising and *preparing for market* an article of produce so essential to the power which was endeavoring to overthrow the government, that it was declared subject to seizure by our armies. If every contract, the execution of which adds to the enemy's power of resistance, is void, this one certainly was so.

If it be true that the law presumes the citizen to intend what he ultimately does in its violation, then the circumstances before the Massachusetts Court presented a case where that Court was bound to presume that the unlawful transportation of the cotton to Massachusetts was one of the original objects of the contract, and to have held the contract void for that reason.

Upon the face of the report, a case was clearly made where the presumption was that the defendant crossed the lines for the purposes of the agreement. Intercommunion was therefore established, and within the reasoning of the case itself, the contract of leasing was unlawful.

A citizen never so loyal, in any way interested in the produce of an enemy's soil, becomes in reference to such products, an enemy. In 1 Kent, 74, 75, 76, it is said, "It was considered by Sir Wm. Scott, *The Phœnix*, 5 "W. Rob. Ad. 21, and in *The Anna Catharina*, do. 161, "that *the possession of the soil* impressed upon the owner "*the character of the country*, so far as the *produce of the soil* "*was* concerned, wherever the *residence* of the owner "might be. The *produce of a hostile soil* bears a hostile "character for the purpose of capture, when in the pro- "cess of transportation from an enemy's country." "The "enemy's lands are the great source of his wealth and the

"most solid foundation of his power; and whoever *pos-*
"*sesses* land in the enemy's country, though he may in
"fact reside elsewhere and be in fact a friend, must be
"taken to have *incorporated himself with the nation*, and the
"produce of the soil is *enemy's property*." "The reason-
"ableness of this doctrine will be acceded to by all na-
"tions, and is particularly recognized by the Supreme
"Court of the United States." See I., Duer on Ins. 451, and 9 Cranch, 191, *Thirty Hogsheads of Sugar*, where Chief Justice Marshal uses nearly the same language. The manifold applications of this doctrine, found in Wheaton, Phillimore, Halleck and every European continental writer, show that Kershaw v. Kelley, in holding legal a lease of land in hostile territory which must result in the production of material aid to an enemy, is clearly at war with it. We have endeavored to show that the only exceptions to the rule that contracts with an enemy are void, are those for ransoms and necessaries. But this judgment sweeps away the rule entirely, and legalizes, not only the continuance, but the creation of every possible agreement for the production of material and the manufacture of supplies in the enemy's territory, where intercommunion across the lines is not involved.

Cohen v. Ins. Co., 50 N. Y., carefully states the correct general principle, and concedes that this contract would be void, if at war with public policy. In arguing that it was not so, the Court takes the three following positions: (1) That the insurance of the life of an enemy involves no interests hostile to those of our Government; (2) That it comes within the principles of the decisions which suspend only the right of action upon bonds and notes; and (3), It approbates the argument in Kershaw v. Kelley, that intercourse across the hostile lines is necessary to render a contract void. These positions we elsewhere consider in our general argument. The objection that the payment of the premium was a condition precedent, was answered by what was to us a somewhat

novel application of the doctrine announced in Brewster v. Kitchen, 1 Ld. Raymond, 317; Touting v. Hubbard, 3 B. & P., 291; Wood v. Edwards, 17 John's Rep., 205; People v. Bartlett, 3 Hill, 570; Wolf v. Howes, 20 N. Y., and other similar judgments, where it is held that performance is excused on the part of a defendant when from a change in the law it becomes illegal or, from the act of God, impossible. We have already considered this subject, and recur to it here simply to say, that after a careful examination of the cases cited, we consider all of them, in their arguments and illustrations, as pointedly against the application of the rule made in the judgment. At page 623 it is said that interest compensates for non-payment of the premiums; and 9 Blatchford, 234, and 7 Bush, 179, make a similar assumption. If a single transaction only is looked at, and we omit to consider the fact that the payment of premiums is not obligatory, and ignore the nature of the mutual scheme which is such that financial injustice of the grossest kind results from compelling the company to pay for those enemy delinquents who die, while few of those who survive pay their premiums at all—then beyond doubt interest, if compounded, would seem to compensate mathematically for payment. But a moment's consideration will serve to show that it does not in fact compensate. These cases overlook the palpable difference to the company between assuming a *risk* and assuming a *loss*. The insurers are entitled to, and do have this interest (*i. e.*, the use of the money), where the contract is exactly carried out; and in a case where the insured is still living, and is in as good health as when the first unpaid premium fell due, we think interest would compensate on a renewal of the policy, because the risk is then the same as would have been taken had the premium been promptly paid. But where the health of the assured has failed or death has occurred, the insurers are called upon to accept a greater risk or an absolute loss, upon the same terms on which

they agreed to accept the risk contemplated by the policy. The ruling of these cases compels the insurers to assume a *loss* for precisely the same consideration which the policy awarded them for assuming a *risk*. But such a consideration is wholly foreign to the necessities of this argument. A policy of life insurance is a part of an indivisible scheme, incapable of existence as an isolated transaction; and all arguments which consider it otherwise are but misconceptions of its true nature.

It was urged upon the New York Court that this scheme created a copartnership, and that upon conceded principles the relations between the members were therefore dissolved by war. This was answered from the bench by pointing out the familiar differences between a copartnership and a corporation whose existence is not at all affected by the withdrawal of a portion of its members. We think such a reply involves a misconception of what must have been the objection of the very learned counsel in that cause. They could hardly have made the mistake of supposing, that the judicial personage created by the laws of and doing business in the State of New York was dissolved because a portion of its members, by virtue of the very terms and conditions provided by the contract itself, or otherwise, had ceased to be such. Manifestly, what was intended to be urged was, that the precise evils resulting from continuing commercial partnerships, follow the continuance of this scheme of mutual insurance—meaning what is to us entirely obvious, that a large body of persons in the loyal region would be interested in the health and prosperity of an equally large number of our enemies, and directly affected pecuniarily far beyond the mass of their fellow-citizens, by the bombardment of every rebellious city, and by every raid into their territory, which would deprive of shelter, raiment or food, other members of the corporation; and that therefore, the principle which dissolves a partnership forbids also this relation. This ob-

jection was not successfully answered by saying, what no intelligent lawyer would question, that a corporation in these circumstances was not dissolved like a copartnership. The difference between the relations of members in this mutual scheme, and of those in ordinary stock corporations the object of which is to prosecute a business unconnected with its shareholders, is most obvious. Here, each member is personally and directly interested in the health and welfare of every other; thus presenting, in the most efficient form, the precise evils upon which the principle dissolving copartnerships rests. In an ordinary corporation, whether there be ten or ten thousand corporators, and whether they be comfortable or uncomfortable, is wholly indifferent.

Semmes v. Hartford Ins. Co., 13 Wall., 158, is relied upon as deciding that the performance of a condition precedent is excused by the war. We think it has no tendencies to sustain such a proposition. The parties had agreed upon a period within which prosecution should be commenced, after every act had been performed and the obligation of the defendant rendered absolute. It was but a conventional statute of limitations. The judgment refers to, and rests upon the same reasons as the decisions which hold, that belligerency suspends the running of the statute.

Sands v. Insurance Co., 50 N. Y., Judge Peckham, for the Court, adds to the list of reasons why the policy is not abrogated, one which will somewhat startle the insurance lawyers of the country. He likens the clause for punctual payment to a covenant to pay a quarter's rent on a common lease. That we have the highest respect for that tribunal it is unnecessary to say. But when such an argument is necessarily resorted to to sustain a judgment, it is to us the very highest evidence that those reasons upon which alone we have a right to rely are wanting.

Clopton v. Insurance Co., 7 Bush, confines the rule we

are considering to policies upon property which, according to the modern usages of war, is ordinarily confiscated when it comes within the power of the enemy. It would continue an insurance upon any branch of industry, without the payment of premiums. It does not take pains to say what would be the judgment, if the subject should be destroyed by raids from the Northern army. In speaking of a non-combatant, this and other cases seem to overlook the fact that they are as necessary to successful war as soldiers. Although learned writers differ as to the per centage which can be spared for the field, common reason shows it has very definite limits. Five hundred non-combatants, as they are termed, might have been selected from the rebel region, whose removal at the outset would have prevented the war; or would have terminated it within twenty days, if effected at any period during its continuance. The Reverend Mr. Clopton of the 7th of Bush, although he did nothing but pray for Jefferson Davis and his government, was, beyond all controversy, of more consequence as a public enemy than any one obscure private soldier from his rebellious State. The distinction in this regard is without reason. It is not overlooked that, within our own reasoning, we are now considering what is wholly immaterial. We assert it to be so. We express our dissent from the attempted distinction, not because it is of any force against our conclusions, but for the reason that it is so frequently relied upon in counter-judgments. The subject of the insurance is never a criterion. That affects only the *degree* of impolicy and unlawfulness. The essential inquiry is, *is it taken for the benefit of an enemy?* No matter whether the subject be a ship, goods upon the ocean, manufactories of the great staples of life inland or scientific manuscripts—in neither case has the insurance any tendency to increase the sum total of the enemy's property. But the evil consists in placing in the enemy's hands, through the obligations of the policy, that which will indemnify

him after loss, thus increasing his resources. That this consideration, and not the subject matter of the insurance or the cause of loss, is the criterion, has been quite fully considered already in our general reasoning, and its illustrations need not be reproduced here.

It may invite a closer scrutiny of this judgment, to call attention to its suggestion that the agent might take a bond for payment of the premium at the end of the war, by way of avoiding the confiscation power of the rebel government. This would require some new headings in insurance books, and cause learned actuaries to study some principles with which they are not familiar.

The case of Hamilton v. Insurance Co., 9 Blatchford, goes upon reasons which would authorize a recovery in a court of law; and, according to the rule familiar in the Federal Courts, the bill should have been dismissed. The decree of Judge Blatchford, as well as that in Cohen v. Insurance Co., 50 N. Y., must have gone upon the ground that the legal right was imperfect, and are precedents in this action at law for the judgment we render.

The most extraordinary feature of the opinion in 9 Blatch., and one affording a remarkable illustration of the liberties which learned Judges will take with fixed rules of law when they stand in the way of what they deem the merits of a just cause, is that part which attempts to answer the forcible objection, that the continuance of an agency to receive premiums became unlawful for the reason that, the instant he received them they were, by operation of the local law, confiscated by the rebel government. With much spirit of expression he declares this is no objection at all, because the agent could refuse the tender, and thus prevent the creation of a debt which the rebel government could seize. The opinion concedes that all agencies, the duties of which cannot be performed without a violation of political duty, are abrogated. When pressed with the fact that the duties of this one came pointedly within the principle, and

asked to apply it in justification of its discontinuance, he replies: We will continue the agency, but avoid its illegality by a suspension of its functions. This is no distortion of the position, but almost its literal reproduction. The mind which was forced to resort to such an answer must have been close to the line which separates its judgment from our own. And this, too, is said in an opinion which holds the removal of the agency a fraud which estops the corporation to deny its continuance.

A somewhat singular application is made of Ruse v. Insurance Co., 26 Barb., 556; 23 N. Y., 515, S. C.; 24 N. Y., 653, S. C.; Buckle v. Insurance Co., 18 N. Y., 541, and kindred cases, which decide that, where the company, by its own fraud, prevents the payments, it is estopped to deny that they were made. It likens the refusal of a loyal citizen to continue a public enemy as his agent, the performance of whose functions is not only to create without consideration an obligation upon himself, but to call into existence successive debts which pass by the mere act of their creation into the rebel treasury. to those frauds and devices which enlightened Judges have declared should not enure to the benefit of the guilty parties. We hardly think comment can be necessary to show the inapplicability of this class of judgments.

Wolf v. Howes, 20 N. Y., 197; Jones v. Judd, 4 Comstock, 411; The People v. Tubbs, 37 N. Y., 586, from the list of judgments which, in modern times, have so justly established the right of a plaintiff to recover upon a *quantum meruit*, where the whole contract has not been completed, but there has been a partial performance beneficial to the defendant, are cited, in our estimation most erroneously, as grounds for the decree. This doctrine in its proper application, is well settled in the Federal Courts. The decisions cited are among the most enlightened of their class, and plainly distinguish between the right they protect and that of authorizing a recovery where a condition precedent has not been performed.

In Dermott v. Jones, *ante*, Judge Swayne in the same judgment discusses and applies both principles. The short answer to what we deem a misapplication of these decisions is, that in this contract, punctual payment is of its essence; and if this is so, such decisions are wholly inapplicable.

Manhattan Co. v. Warrick, 20 Grattan, 614. This case, decided by three Judges against two, furnishes slight authority for the plaintiff. It is needless to say that, in our estimation, the reasoning of Judge Christian and his dissenting associate, is the better law. An enemy creditor insured the life of an enemy debtor, in a loyal company; and a distinction between such a contract and one directly upon commerce and property, is still more subtle and fanciful than as if the policy were upon the husband or father for the benefit of the widow and children. Still, the reasons upon which the last is protected, just as conclusively sustain, a public enemy's insurance of one of his commercial securities.

In opposition to the most familiar judicial history, it is said that no judgment has ever held a partially-performed contract abrogated; that the principle is never applied where it will injure the parties; and that the defence is actually immoral. This is quoted and approved in 9 Blatchford. Every case of marine insurance and all in reference to commercial intercourse, involved partially-performed contracts, the annulling of which entailed loss upon the parties. No branch of the rule has the slightest reference to personal protection, but in all instances of its assertion has universally subordinated private interests to the policy and presumed good of the nation.

The *consequences* of the abrogation involve quite different considerations. An executory contract, under which money has been paid, annulled by war, might, in particular circumstances, authorize after peace, a recovery upon the common counts, as in the case of a rescinded contract. This question is not before us, and is

referred to only as an answer to some of the extravagant illustrations employed in the opposing argument.

We are unable to appreciate the argumentative effect which the opinion imputes to the facts that a local statute demanded an agency, and that the policy constituted a Virginia contract; although these features seem to constitute leading reasons for giving judgment for the plaintiff. If the continuance of the contract is against public policy, it is wholly immaterial where it was made. If the functions of the agent could not be lawfully exercised, it is of no consequence that he was originally appointed by the compulsion of the statute. It seems to us that the only important inquiry, viz., "Are the substantial relations existing between the parties such as war dissolves?" is overlooked.

Judgment must be rendered for the defendant with costs.

22 Mail 47

41 Conn—

22 Mail 236

1 Lawrence 87

8 Hull 590

1 LaRaymond 314

41 Conn 342

12 East

8 H & Sea volunteers

Washington regiment

8 Mail 158

16 Mail 208

11 " " 588

3 " "

15 Mail

8 Mail—Paul

23 Ohio St 105—

2 Mail 445—

Clifford

3-24

Supreme Court of the United States.

OCTOBER TERM, 1875.

No. 218.

The New York Life Insurance Co.

vs.

Charlotte Seyms.

Notes of Argument and Citations of Authorities.

By JOS. CASEY,
For Defendant in Error.

Judd & Detweiler, Printers.

Supreme Court of the United States.

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NEW YORK LIFE INSURANCE COMPANY

vs.

CHARLOTTE SEYMS.

CASEY'S MEMO. FOR ARGUMENT.

I. The first point of plaintiff in error puts out of view and ignores the great and controlling fact in the case—the intervention and existence of a great war, in which the insurers and insured became and were opposing belligerents—public enemies.

In relation to the condition, the elementary principle contended for is not a sound one.

Says Bliss, in reference to this very subject, p. 673:

"*There is a manifest distinction between mere impediments and difficulties in the way of performance of a condition, and impossibility created by law, or acts of God, or the government.*"

See also Wood *vs.* Edwards, 19 John., 205.
People *vs.* Bartlett, 3 Hill., 570.
Brewster *vs.* Kitchin, 1 Ld. Raym., 317.

"An individual, (says Nelson, J., in People *vs.* Bartlett,) by his covenant, may undertake, as against his own acts and the acts of strangers, but not against the acts of God, or his own Government."

The case of the Charter Oak and Worthington, cited from (41 Conn., 372) is unsound in not drawing this distinction.

The case of Want *et al. vs.* Blunt *et al.*, 12 East., 183, has no sort of similarity to this case—no more than has the other case of The Phœnix Life Ins. Co. *vs.* Sheridan, (8 Ho. of Lds., 745.) Both were cases of mere voluntary neglect to perform the stipulations or conditions of the policy, and were, as a matter of course, fatal to its continuance.

The fallacy is in holding that these payments are conditions precedent to the life of the contract. They are not so. A complete and executed contract for the term of the natural life of Henry S. Seyms existed, (see policy, Record, pp. 5 and 6.) *The payments of the annual premiums are conditions subsequent, by non-performance of which the contract may cease or be forfeited.*

The case cited from Law Reports, 9 Chan., 495, 502, was not a life insurance case, but a mutual beneficial society, and the only principle decided is that a member forfeited his membership and the benefits of the association by continued voluntary neglect to pay his dues.

The case in Law Rep., 9 Eq., 702, is an authority strongly in our favor. It was a life insurance, and by the contract the insured was to pay the accruing premiums to the directors. When the premium became due, the directors had resigned, and the company was in liquidation; and because there were no directors to pay to he was exonerated from the condition. This is our case exactly.

The case in Law Rep., 17 Eq., 316, 320, has not the remotest semblance to the case at bar in fact or principle.

The only point in Earl of Shrewsbury *vs.* Scott was, 6 C. B., (N. S.,) 1:

"Where the performance of an act is made a condition precedent to the exercise of a power, (relating to real estate,) and the law renders performance impossible, the

power cannot be exercised without the performance of the act."

The cases cited on this branch of the case, so far as I can have reference to them, are all cases of simple, volutary neglect, or pecuniary inability to pay, except that of Taint *vs.* N. Y. L. Ins. Co., before Judge Emmons, and 41 Conn., 372.

The balance of the cases cited by my learned friends, under 5th Div., p. 13 of their brief, *relate to cases where the condition was precedent to the inception of* the contract. None of them are like this, where there was a valid and subsisting contract, the extension and perpetuation of which depended upon future acts, which were rendered impossible by the act of God, or illegal by the action of the Government.

In Barker *vs.* Hodson, (2 M. and S., 267,) the court held that an attempt by defendant to excuse himself for not furnishing a cargo in a foreign port, as he had contracted to do, because he was prevented by a law of that port, made during the pestilence, the court held that the law of the foreign port was no excuse, but it would have been otherwise if the act had been prevented by the law of England.

The reason for the distinction, may it please the Court, is as broad as the highway. In the first instance, no right is vested, and *cannot vest* till the condition be performed. In the other the right is vested, *and will not be divested*, by the not doing of that which the act of God has rendered impossible, or the Government has made illegal or criminal.

The very principle of this case, I submit, was ruled by this Court, in Semmes *vs.* The Insurance Co., 13 Wall., 158. There it was a condition, that unless suit should be brought within twelve months after the loss shall occur, that no such suit should lie. Your Honors held not only that this condition was suspended by the intervening war, but absolutely abrogated. This was clearly upon the principle above stated,

that a condition subsequent, rendered by the war impossible of being performed, should not divest a vested right.

The same was held as to the Texas Land Grant to the El Paso Railway, where the grant was conditioned upon the building of the road, in a designated time. The condition having been rendered impossible of performance by the occurrence of war.

Davis *vs.* Gray, 16 Wall., 203.
Taylor *vs.* Taintor, *Id.*, 369.
People *vs.* Tabbs, 37 N. Y., 586.

So where the policy was conditioned to be void, *if the assured should die by his own hand.* Yet in a case where, by the visitation of God, the insured had lost the power to resist the suicidal tendency of a mental malady, your Honors held the condition inoperative.

Ins. Co. *vs.* Terry, 15 Wall., 580.
United States *vs.* Thomas, 15 Wall., 337.

And upon cognate principles rest all the cases, decided on the statute of limitations, where not only a private contract, covenant, stipulation or condition, is suspended by war, but a solemn enactment of the legislative power.

Hanger *vs.* Abbott, 6 Wall., 532.
The Protector, 9 Wall., 687.
Levy *vs.* Stewart, 11 Wall., 244.
Protector, 12 Wall., 700.

From all these considerations I argue that there was no forfeiture from nonpayment of the premium.

II. Was the contract ipso facto annulled and abrogated by the war?

1st. The first position on the other side is a most anomolous one, viz :

That a citizen and resident of Mississippi, with his property, family, business and livelihood there, should leave them to go to New York, to hold commercial intercourse with this Insurance Company, by paying the annual premium on this policy.

Do not the gentlemen comprehend that the payment there was illegal and void? If even he, as a citizen of Mississippi, had gone to the Company's office and paid it there, it was a breach of the non-intercourse laws.

This is the very principle of the Montgomery, Grosmayer, and Lapene cases—cited by them. These are a complete answer to this suggestion; because the law forbade the payment to the insurance company in New York, whether the assured was there or in Mississippi.

Phillimore (3 Vol., p. 735,) lays down the elementary principle which governs contracts between enemies:

"The sound rule of international law is that war suspends but does not annul obligations contracted between individuals of different countries before its existence, or, as it has been happily expressed: *Jus exigendi nobis quæsitum fuit ante bellum, hoc jus non desinit nostrum esse, existente bello, ut pote quo non jus tollitur sed juris executio*—The obligation which was binding on us before the war, this right does not cease during the existence of war, but only the execution of the obligation is suspended."

Citing *Cocceius and Grotius.*

1 Duer on Insurance (p. 478) says:

"There are, doubtless, many contracts of which a war suspends the existence without dissolving the obligation. The distinction is probably this: *A vested right under a subsisting* contract is not affected by a subsequent war; but where the contract is executory, and would have been illegal if made in time of war, it becomes so from the time hostilities commence as to all acts to be performed by either party during the war."

In Lawrence Wheaton, p. 529:

"It appears, then, to be the modern rule of international usage that property of the enemy found within the territory of the belligerent state, or debts due to his subjects by the Government or individuals, at the commencement of hostilities, are not liable to be seized and confiscated as prize of war. This rule is frequently enforced by treaty stipulations, but unless it be thus enforced it cannot be considered an inflexible rule."

Ch. J. Marshall, in Brown *vs.* United States, (8 Cranch, 123,) says:

"The universal practice of forbearing to seize and confiscate debts and credits, the principle universally received that the right to them revives on the restoration of peace, would seem to prove that war is not an absolute confiscation of this property, but simply confers the right of confiscation."

See, also, Bliss on Life Insurance, (p. 669 to 683,) where the question is discussed at length, and the recent cases reviewed.

The principle contended for—that in case of death it increases the resources of the enemy—proves too much. The same would be true of a debt falling due on note, bond or lease. "*It is to the extent of its amount the creation of an absolute right,*" *or the case of an annuity.*

Yet, radical as my learned brethren are, they would not contend for such a result, as it would be in direct conflict with all modern usage and authority, and repudiated for more than 300 years by all civilized nations of christendom.

The point decided in Furtado *vs.* Rogers, (3 Bos. & Pull., 191,) was, *was a marine insurance* effected in Great Britain on a French ship and cargo, previous to the commencement of hostilities between Great Britain and France? *Held that it did not cover a loss by British capture.*

The reasons and principles of marine insurance do not

apply here, and all the reasoning in Furtado *vs.* Rogers depends upon that.

Is there any similar case of a paid-up or perpetual insurance of houses, furniture, pictures, library, where the policy was avoided ipso facto by war?

I take it there is none, or these learned gentlemen, aided by the ablest insurance solicitors, would have produced them.

Nor does it seem to me that the wish on the part of loyal stockholders, that the lives of non-combatant enemies should not be sacrificed or endangered, is any other than a proper wish. It is what every just Christian man should desire. But even if *loyal* stockholders should be more *prudent* than *patriotic*, it would not affect the principle.

I have not had access to the opinions and briefs cited in the gentlemen's brief, in the central paragraph on page 17, and therefore cannot make reply to them. I presume, however, they contain an elaboration and enforcement of the grounds and principles upon which the learned gentlemen rest this case; that is—

1st. That payment of premium is a condition precedent, and failure is forfeiture.

2d. That being an executory contract, and not an executed one, or vested right, the intervention of war absolutely annuls it.

3d. That being only capable of being kept alive by payments, which the war and statute made illegal and impossible, it necessarily lapsed.

To this I oppose the principles—

1st. That it is an executed contract for the life of Seyms—a vested right in Mrs. S.

2d. That the stipulated payments were conditions subse-

quent, and the contract was *suspended*, but not *annulled*, by the war, and renewed on the return of peace.

3d. That these views are in accord with the liberal and advancing views of modern civilization, which seeks to preserve and protect all private rights between individual non-combatant belligerents.

They are sustained by the following well considered authorities:

Griswold *vs.* Waddington, 16 John., 438.
Manhattan Life Ins. Co. *vs.* Warwick, 20 Gratt., 614.
New York Life Ins. Co. *vs.* Clopton, 7 Bush., 179.
Sans *vs.* N. Y. L. Ins. Co., 50 N. Y., 626.
Cohen *vs.* Mut. Life Ins., 50 *Ibid.*, 610.
Hamilton *vs.* Mut. Life Ins. Co., N. J., 9 Bl. C. C., 234.
Hillyard *vs.* Mut. Ben. L. Ins. Co., 37 N. J. Rep., 444.
Ruse *vs.* Mut. Ben. L. Ins. Co., 26 Barbour, 556.
Hodson's Adm. *vs.* Ins. Co., 1 Biggelow, 219; 97 Mass. Rep., 144.

III. THIS IS A MISSISSIPPI AND NOT A NEW YORK CONTRACT. See Supplementary Brief, pp. 2 to 5.

The contract was made in Mississippi, and by its terms the premiums were only payable to the agent there. The insured lived there and performance was to be there. The company was bound to have an agent there, and had not. *On the contrary, it is expressly stated that they had no such agent there*, (Record, p. 13.)

As a corporation created by and existing under the laws of the State of New York, it could have no legal existence beyond the limits of that State. (Bank of Augusta *vs.* Earle, 13 Peters, 586.) And this ruling, except as modified by in-

termediate cases, on questions of jurisdiction, is maintained and enforced in Paul *vs.* Virginia, (8 Wall., 168.)

There the question directly arose as to the right and power of the State of Virginia to impose upon corporations created by other States, conditions and restrictions similar to those in Mississippi. Says Mr. Justice Field:

"*Such contracts* (policies of insurance) *are not inter-state transactions, though the parties may be domiciled in different States. The policies do not take effect; are not executed contracts until delivered by the agent in Virginia. They are then local transactions, and are governed by the local law.*"

As to agency see—

Clark *vs.* Morey, 10 John., 73.
Conn. *vs.* Penn., 1 Pet. C. C., 496.
Deniston *vs.* Imbrie, 3 W. C. C., 396.
Buchanan *vs.* Curry, 19 John., 137.
Kershaw *vs.* Kelsey, 100 Mass., 561.
See also, Daniels *vs.* Hudson River Co., 12 Cush., 417.
Fant *vs.* Miller, 17 Grattan, 47.
2 Pars. on Cont., §§ 583 and 587.
Ward *vs.* Smith, 7 Wall., p. 445, Bliss, 657.

The same doctrine is held by the supreme court of Ohio:

"Companies complying with the statute referred to and doing business in this State (Ohio,) under licenses (required by statute) become in suits brought against them there personally amenable to the jurisdiction of the courts of this State, and are to be treated for purposes of suits as corporations of this State." (N. Y. Life Ins. Co. *vs.* Best, *et al.* Sup. Court Ohio, Dec. '72; 23d Ohio State, Rep. 105.) (Sec. 18, Act of Ohio Leg., April 27, 1872.)

THE AGENT, BARBOUR, COULD HAVE RECEIVED THE ANNUAL PREMIUMS.

Mr. Justice Davis says, in The United States *vs.* Grossmayer, 9 Wall., p. 75:

"We are not disposed to deny the doctrine that a resident in the territory of one of the belligerents may have, in time of war, an agent residing in the territory of the other, to whom his debtor could pay his debt in money, or deliver to him property in discharge of it; but in such case the agency must have been created before the war began, for there is no power to appoint an agent for any purpose, after hostilities have actually commenced; and to this effect all the authorities."

See also Griswold *vs.* Waddington, 16 Johns., 438.

IV. Every intendment consistent with the contract will be made to prevent forfeiture.

McAllister *vs.* N. E. Mut. L. Ins. Co., 101 Mass., 558.
N. E. Mut. L. Ins. Co. *vs.* Hasbrook, 32 Ind., 447.
Helme *vs.* Phila. L. Ins. Co., 61 Penn., 107.
Bliss on Life Ins., §§ 186, 190.
Thompson *vs.* St. Louis Mut. L. Ins. Co., 52 Mo., 469.